REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

CONSISTORY COURT OF LONDON;

CONTAINING THE

JUDGMENTS

OF

THE RIGHT HON. SIR WILLIAM SCOTT.

BY JOHN HAGGARD, LL.D. ADVOCATE.

IN TWO VOLUMES.

VOL. II.

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1822.

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CASES

DETERMINED IN

THE CONSISTORY COURT

OF

LONDON,

&c.

LOVEDEN *v.* LOVEDEN.

13th *July* 1810.
Principles of evidence in cases of divorce by reason of adultery, &c.

THIS was a case of divorce by reason of adultery of the wife, in which the principles and rules of circumstantial evidence, in such cases, were much discussed to the effect appearing in the Judgment.

JUDGMENT.

Sir *William Scott.*—This is a proceeding by *Edward Loveden Loveden* Esq. against *Ann* his wife, praying for separation, by reason of adultery. Nothing arises upon the proceedings: they have been conducted, as far as they go, in the usual manner. The articles, which are many in number, plead a marriage to have taken place on the 15th of *November* 1794. This marriage is admitted, and is likewise fully proved by many witnesses. Cohabitation continued between the parties till the 15th of *March* 1809, when, upon the disco-

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very of an adulterous intercourse, as alleged, with Mr. *Raymond Barker*, son of a neighbouring gentleman in the country, and who is described as a lay-fellow of *Merton College* in *Oxford*, she was ordered to withdraw from her husband's house, and the cohabitation has never been renewed. She has offered no plea of any kind, but rests her defence, so far as it is preferred by her counsel, on the insufficiency of his proofs, and upon the answers to the interrogatories which she has addressed to several of his witnesses. These witnesses are twenty in number, including the person who formally proves the public documents relative to the license and marriage; and they are stated to be supported by letters written and sent by herself to Mr. *Barker*, but intercepted by a servant, and communicated to Mr. *Loveden* by the agency of that servant.

It is not necessary for me to state much at large the rules of evidence which this Court holds upon subjects of this nature, or the principles upon which those rules are constructed:—they are principles so consonant to reason and to the exigencies of justice, and so often called for by the cases which occur in these Courts, that it is on all accounts sufficient to advert to them briefly. It is a fundamental rule, that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable: it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case, and

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and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books: at the same time it is impossible to indicate them universally; because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations,—neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtilties, and remote and artificial reasonings upon such subjects. Upon such subjects the rational and the legal interpretation must be the same.

It is the consequence of this rule, that it is not necessary to prove a fact of adultery in time and place. Circumstances need not be so specially

 proved,

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proved, as to produce the conclusion that the fact of adultery was committed at that particular hour or in that particular room; general cohabitation has been deemed enough. Parties living for months and for years together, and hoping by that means to insult the feelings of a husband, and to elude the justice of the tribunals which have to decide upon such matters, have by such contrivances supposed that they were sufficiently protected; but the courts of justice have held that that is an evasion which was perfectly insufficient for such a purpose, and the parties have been concluded by general cohabitation. This has been laid down repeatedly, and acted upon in this Court, in cases such as *Cadogan* v. *Cadogan**, *Rutton* v. *Rutton*:

9th *Feb.* 1796.

* In the case of Lord *Cadogan* v. Lady *Cadogan*,—The Court, after a full and particular examination of the effect of the evidence on the libel, (*a*) and the responsive allegation, observed— My opinion is so completely founded on the view of these facts, that it might not be necessary to go further: the sequel, however, calls for some observations from the Court. Lord *Cadogan* pleads "that the parties retired together into *Wales*, where they "lived in domestic intimacy." In the responsive allegation it is pleaded "that they did not go by agreement; but that they met "there accidentally;" though it admits that they continued in that part of the country together. The improbability of this story is so strong, that even *Ball*, the servant maid, revolts at it, and takes it for granted, that Mr. *Cooper* went there, in consequence of knowing that Lady *Cadogan* was living at that place. Something has been said in defence of such a measure, as natural to persons in their situation; that, being outcasts of society, they might shut out the world, and all scandal together. Lady *Cadogan*, in this suit, stands highly on her honour, and desires her friends and the public to suspend their judgment till the cause shall be decided; and the Court is not to suppose that she was

(*a*) It is to be regretted that no sufficient notes have been preserved of this long and elaborate judgment, as it is recollected to have been.

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Rutton: and other cases have been confirmed by the Court of Delegates, and is the established principle of this Court. Such are the general rules and such the general principles established here; and it is with reference to those general rules the present case must be examined. It is possible that the case may not require the application of the more extended rules, because it is possible that there may be such direct proof of the fact of adultery as not to stand in need of such an application.

Of the manner in which these parties lived together before about the year 1803, I think there is no evidence adduced which shows the state of the parties one way or other; excepting that it appears, indeed,

---

so deserted, as to be under the necessity of finding an asylum only in the society of the very person, who was the cause of the imputation which had been cast upon her They do in fact however retire, and pursue their journey together to several places, in all of which the Court is desired to believe, that all which passed was innocent, because nothing had been exposed, contrary to common decency, to the waiters and servants of the places where they have resided.

It is true that Mr. *Cooper* sleeps at the inn; but is, in all other respects, domesticated in Lady *Cadogan*'s house. He is there in the morning, and 'till night; his clothes are at the house, his horse also — he takes his meals there — every thing is there — he himself is constantly there, except for a few hours of the night. It is then from these few hours, and from the evidence of witnesses selected by themselves, that the Court is required to suppose, that all this intercourse was perfectly innocent. Abstracted from all the former facts, this might almost be considered as composing a separate and detached case. Here is the wife of another husband, and the husband of another wife, quitting all public and domestic duties in their own stations, retiring together and shutting out all witnesses, except persons chosen by themselves. Can it be necessary that the Court should require any other evidence than this, in the nature of facts of indecent behaviour?

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indeed, that down to the very time of this alleged discovery nothing had arisen which had awakened suspicions in the mind of the husband. It is, I think, spoken to by *Calcutt*, who had been house-keeper in the family for some time, that in the year 1803 a connexion which had subsisted between the family of Mr. *Loveden* and the family of a neighbouring gentleman, Mr. *Barker*, who lived at *Fairford* in *Gloucestershire*, had produced something that attracted the attention of this witness in particular. Mr. *Barker*'s family had lived upon a footing of great intimacy and friendship with the family of Mr. *Loveden*, which appears, in the later periods of it, to have been disturbed and interrupted in consequence of the transactions between this gentle-

haviour? Is it for the interest of society that such a principle should be maintained? Mere cohabitation in this way, must, in itself, be held sufficient to found the judgment of the Court conclusively against them. In the case of *Rutton* v. *Rutton*, (*a*) there was a defence of the same kind: and though the gentleman slept in the house, it was proved that he had a separate room, and the witnesses, to that part of the case, declared that they had never observed any indecent familiarities between them. But in the Court of Delegates it was strongly held "that general cohabitation excluded the necessity of proof of particular facts." It may be possible that persons, of peculiar and eccentric dispositions or habits, may live together, in such manner, without actual criminal connexion, and it is physically possible, that persons may be in the same bed together without criminal intercourse. Courts of justice, however, cannot proceed on such ground: finding persons in such a situation as presumes guilt *generally*, they must presume it in all cases attended with these circumstances. They cannot adopt the extravagant professions of Platonism for the principles of their decisions. Such would be the decision of the Court on this point alone; but the Court is not at liberty to put

(*a*) Arches, 26th *January* 1796. *Deleg.* 11th *Nov.* 1798.

out

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gentleman, who was a son of that family, and Mrs. *Loveden*;—for though it never did reach the eyes nor the ears of Mr. *Loveden* himself, it is alluded to in a conversation which passed between Mr. *Barker* and the butler, *Hastings*, who is a capital agent in these transactions;—it is alluded to that it had been known, and with feelings of great uneasiness, at his family house at *Fairford*: and that it was calculated to produce uneasiness there, cannot be denied; because he had been received with great hospitality in this house,—with great familiarity: and it is most fully admitted by the counsel on the part of Mrs. *Loveden*, that that which had occurred certainly was not that which such treatment ought to have produced. It is admitted by them, and could not be denied, without flying in the face of that mass of evidence which now lies before me, that a most improper attachment had taken place between these parties, and that acts extremely indelicate had passed between them; for they raise the question no higher than this, Was this attachment accompanied by adultery? Were these acts, indelicate as we must admit them to be, attended with the crime of adultery?

These admissions, which as I say could not be avoided without encountering the whole of the

out of its recollection all the antecedent facts of the case, on which It has before observed. Looking to them and to the main fact—the admission of a gentleman to her bedchamber at night, under the frivolous plea of illness, that has been set up, and to all the other particulars, which have been established in evidence, I feel myself compelled to pronounce, that the case is fully proved, and that Lord *Cadogan* is entitled to the relief which he prays.

 affirmative

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affirmative evidence which is here produced, will relieve me from the necessity of entering very minutely into the particular circumstances vouched by a great variety of witnesses. They certainly do prove a state of intimacy between these parties suspicious in the highest degree. The parties were observed to be fond of walking together separately from the rest of the family, arm-in-arm together;—that she paid particular attention to his accommodation when he came to the house,—was peculiarly attentive to the preparations of his room,—to the ornaments of his room,—even occasionally assisting to make up the fire in his room;—that she addressed herself with particular attention to him at dinner and meals;—that he came evidently by appointment, and when the husband was absent from *Buscot*, the place of his residence, or particularly engaged; that this attracted the notice of these witnesses, and convinced them that his visits must have been by appointment; because no sooner was the back of Mr. *Loveden* turned, than this gentleman appeared:—that while he was there, and the husband was absent, she was ordered to be denied to all other persons who came there, and was actually so denied;—that if Mr. *Loveden*'s return was announced by the ringing of the house bell, they separated immediately, and met again in Mr. *Loveden*'s presence as if for the first time,—as if they had not been in company and held any conversation before;—that they were fond, when walking in company, of separating from the rest of the company, walking together separately, and in the attitudes described;—that they were often seen retiring into the shrubberies and plantations in the garden;—that he came very frequently on horse-back, coming

coming with his horse into these plantations and shrubberies unknown till observed by servants; and never going up to the house, but meeting this lady at these places;—that they have been seen in the gardens with arms round each other's waist; —that they were seen upon one particular occasion to kiss each other; that upon finding themselves observed, they retired in great confusion; that at table they were in the habit of sitting close together, and, as the butler positively swears to his own observation of the fact, with their legs and feet fixed together under the table;—that in *London* they met, and evidently upon signals and by appointment, to ride together in the Park;—that he has been seen to lay his hand upon her hip, and, upon being observed, to withdraw it in confusion; that at another time he laid his hand in a most familiar manner upon her shoulder;—that he was admitted alone into her dressing-room, where other gentlemen were scarcely ever admitted; and that he was so admitted totally unknown to Mr. *Loveden*;—that when parties went out coursing or hunting, these two persons always came home an hour before the rest of the company, and remained alone together:—in short, that a degree of familiar intercourse took place which attracted the notice of every servant and of every visitor in the house.

These are facts spoken to by such a number of the witnesses, that I must repeat great part of those depositions which have been read, and which have been commented upon much at length, if I were to refer to them: I must state them entirely over again if I were to enumerate the particular facts spoken to in the depositions which these several

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several witnesses have given; for all the servants, in various capacities which gave them opportunities of observation, concur in describing the intercourse as suspicious, and as gross in a very high degree.

It has been made matter of objection, among the few objections which it was possible for the ingenuity of advocates to collect upon this occasion, that this lady seems to have been living amongst spies, and that they seem all to have acted with unfavourably conceived impressions. The fact is, that their observations were awakened, and could not be otherwise than awakened, by the appearances which were presented to their view. Such scenes as these going on in a decent and respectable family, and some of them passing under the eyes of such a number of persons, could not but excite observation, could not but provoke conversation among them. If the evidence had been otherwise, I think it would have furnished a just ground of imputation; for such circumstances, as are described by the witnesses, could not pass without producing such consequences and conversation among them: they must provoke the indignation of the servants; they must have alarmed their vigilance, and have engaged them in what we find them to be engaged in,—the common purpose of defeating and detecting an intercourse so disgraceful to the house and so injurious to their master. The only wonder in the case, I think, is, that such an intercourse could have been possible for such a length of time, without in some way or other, by some accident, by some information, reaching the notice of Mr. *Loveden.* It had certainly attracted the notice of his visitors;—so says Mr. *Seymour,* who was a visitor in

in the house, and who states that he had himself observed so much, and had heard so much from other persons who had seen the same, that he found himself compelled by the duties of friendship to expostulate with her upon the intercourse, which he did not at that time suspect to be criminal, but which was at least suspicious, between her and Mr. *Barker*. She took it ill, and declared that so long as Mr. *Barker* behaved well to her she should not alter her behaviour to him;—a pretty strong proof of a blind attachment to this gentleman; because a woman of delicacy, who had been informed by a friend that her character was suffering, in the opinion of respectable persons, on account of the footing on which she was with another gentleman, would at least, for the protection of her good name if not of her innocence, have avoided appearances that had led to such unfavourable impressions of her character.

Mr. *Pryse*, who is the son of Mr. *Loveden* by a former wife, says, that he had observed attentions, though not with the suspicions which must have been excited if he had seen more. It appears by the conversation to which I have already alluded of the butler, *Hastings*, with Mr. *Barker*, to have found its way into the general talk of the country. With all this, however, nothing appears to have attracted the notice of Mr. *Loveden*. That occurred in this case, though certainly in an uncommon degree, which happens in many others,—that the husband is the last person who entertains a suspicion of his misfortunes. There is, I think, no reason whatever to presume any kind of connivance on his part, or any other forbearance than what arose from the most profound

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found ignorance of the dishonour that was practising upon him.

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There are several particular instances of the familiarities passing between these persons, which I think it may not be improper for me more particularly to advert to; and, amongst the rest, some that are spoken to by *Hooper* and by *Chamberlain*: by *Hooper* upon the fifth article, and by *Chamberlain* upon the same day. *Chamberlain* says, "That on a *Sunday* morning, happening some "time about a year and a half and within two "years last past, Mr. *Barker* having either slept "at *Buscot House* on the preceding night, or "having called there on the *Sunday* morning, and "the family being preparing to go to Church, and "the carriage having gone for that purpose, and "being about to come round to the door, he "having Mr. *Barker's* horse in the stable, came to "the under-butler, who was then in the pantry at "the bottom of the stairs, and near to the billiard-"room, and asked him if Mr. *Barker* had ordered "or if he wanted his horse; and to the best of his "recollection *Hooper* replied, that Mr. *Barker* "was gone into the green house, and that if the "deponent would stop a little he would show him "some of Mrs. *Loveden's* tricks: and the bell of "the room in which the family had breakfasted "having just then rung, the said *James Hooper* "desired the deponent to go into the butler's bed-"room, and watch from the window thereof, "which commands a view of the conservatory or "green-house, whether Mr. *Barker* came out of "the said green-house or not; and that *Hooper* "then went to answer the bell, and the deponent

"watched

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" watched as directed from the butler's bed-room
" window; and that shortly afterwards he saw the
" family go to Church, but Mrs. *Loveden* having a
" pain in her face staid at home, and did not go
" that day: that as soon as the family were gone
" to Church, *Hooper* came into the butler's bed-
" room to the deponent, and told him to listen and
" he would soon hear Mrs. *Loveden* come down
" stairs, and go through the billiard-room into the
" green-house;—that he continuing to listen as
" desired, he plainly heard Mrs. *Loveden* come
" down the stairs and go into the billiard-room;
" she went through the communication as before
" described in the conservatory;—that *Hooper*
" afterwards came and told the deponent he had
" been through the billiard-room and Mrs. *Love-
" den's* dressing-room, and into the small further
" room, and that she was not in either of the said
" rooms, and must have gone into the green-house;
" that being then quite certain that Mrs. *Loveden*
" and Mr. *Barker* were together in the said green-
" house, and having occasion to be about some
" part of his business in the house, he desired the
" deponent to keep on the watch from the butler's
" bed-room window, in order to see whether they
" came out of the said green-house or not; that
" the deponent accordingly did watch until the
" family returned from Church; that *Hooper* oc-
" casionally came into the said bed-room to him;
" but neither Mrs. *Loveden* nor Mr. *Barker* were
" seen till Mr. *Loveden's* carriage drove up to the
" front door on the return of the family from
" Church, which could plainly be heard by them
" in the green-house; and immediately after this,
" upon the hearing the noise of the carriage

" coming

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"coming up, the deponent saw the said Mr. *Bar-*
"*ker* come out of the green-house by one of the
"windows thereof, and go round by the back of
"the green-house and pass the north front of the
"house, and go towards the stables; that he
"directly afterwards saw Mrs. *Loveden* come out
"of the green-house through one of the sash win-
"dows thereof nearer to the house, and go and
"meet her mother; and he heard her mother
"blame her for being out, and say she would have
"more pain in her face, or to that effect. That he
"immediately came out of the butler's bed-room,
"where he had remained at the time, and ran
"down to the stables, and overtook Mr. *Barker*
"going to the stables, and brought out his horse
"to him, and he rode away in the direction for
"*Oxford*."

Now to be sure this is evidence which shows an advantage was taken of the retirement of the family for the purpose of going to Church. This is fully confirmed by *Hooper*, as far as he had an opportunity of observing: he did not wait along with *Chamberlain*, because his business called him into the house; but, as far as he goes, he fully establishes the fact,—that in this green-house they were together from the time that the family went till the time that the family returned, and that they then separated in such a manner—(for that is a circumstance not to be laid out of consideration in all these cases)—that they then separated in such a manner as to elude the appearance of their having been at all together, thereby giving to this meeting an appearance of secrecy and clandestinity which leads to a suspicion of every thing improper.

There is another thing spoken to by *Hooper* at a succeeding time, and it is this.—He says, "That "in the month of *January* 1808, when Mr. *Barker* "was on a visit at *Buscot Park*, and all the com-"pany then at the house had gone out to take the "diversion of coursing, and amongst them Mrs. "*Loveden* and Mr. *Barker*, these two, as they "usually did on such occasions,"—a fact which is spoken to by other witnesses,—"came home about "an hour before the rest of the company and "more: and after they had been in the house a "short time, there having been a dish of fine fish "caught, and the cook wishing to know how "Mrs. *Loveden* would choose to have them "dressed, he the deponent took them on the dish "in order to show them to his mistress, and to "take her orders as to the dressing the same; "that for that purpose he went into the library "and breakfast-parlour, then up to Mrs. *Loveden's* "own bed-room; and having knocked at the door "thereof, which was ajar, and no person answer-"ing, he went into the same, and from thence "into the little dressing-room adjoining, which "was used by Mrs. *Loveden*, and also into the ad-"joining room called Mrs. *Loveden's* dressing-"room, and into every other bed-room on that "floor, except one room,"—that he particularly describes,—"and he could not find her in any of "the said rooms, nor did he see Mr. *Barker*: that "upon his return down stairs he met Miss *Love-*"*den* on the hall floor nearly opposite the library "door, of whom he inquired if she knew where "Mrs. *Loveden* was; to which she answered she "did not, but supposed she was in the room called "the Dressing-Room, or to that effect. He told "her

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" her he had been there, but that she was not in
" the said room: that immediately afterwards she
" came out of the dining-room into the hall to the
" deponent, and appeared very red in the face and
" extremely confused, and held her riding-habit
" half way up her legs, as if she did not know
" what she did from the confusion she was in; and
" that having given the deponent orders as to the
" manner she would have the fish dressed, she then
" went into the library to Miss *Loveden*, and the
" deponent carried the fish down stairs: that he
" immediately came out again to the side of the
" stairs and listened, and that he heard a man's
" footsteps come out of the said dining-room,
" which Mrs. *Loveden* had just before left, and
" run up stairs." The fact then is, that the parties came home an hour before any of the rest of the family, that they were not to be found, and that this servant who went to speak to his mistress came to the dining-room door; that she met him, so as to prevent his entering the door, in a state of confusion, and that a man was there; and as Mr. *Barker* could not possibly be any where else, I think it leads to the unavoidable conclusion that he was the person who was there.

There is another fact which is mentioned, that is of the same nature, and which leads to conclusions of the same kind. He says, "it was not a
" custom with him, as business did not call him, to
" walk in the gardens, pleasure grounds, or plan-
" tations at *Buscot*; so that he had but little op-
" portunity of seeing them; but he knew that
" they were in the habit of walking together about
" the said grounds, plantations, and gardens; for
" he has himself seen them go into the plantations
" and

" and about the green-house garden, and has at
" such times frequently seen them walk together
" arm-in-arm within view of the house. That one
" afternoon in the year 1805, when a Mrs. *Stephens*
" of *Bath* was on a visit at *Buscot Park*, the depo-
" nent, and *William Musson*, a servant to a gentle-
" man who was there likewise on a visit, having
" been walking out in the Park, and coming into
" the plantations, they saw two persons at a little
" distance approaching that part of the plantation
" where they then were: upon which the deponent
" and this other servant who was with him, not
" knowing who they were, stopped in the thick
" part of the plantation among the shrubs till they
" passed them; and as the said two persons ap-
" proached, the deponent and this other servant
" plainly saw Mrs. *Loveden* and Mr. *Barker* walk-
" ing together, having his arm round her waist,
" and Mrs. *Loveden* having her arm round his
" waist; and he and his companion remained
" concealed in the plantation until they had passed
" by: then they came out of the plantation, and
" went towards the house; and when they had
" got into the park again to go to the house, they met
" Mrs. *Stephens*, who inquired of the deponent if
" he had met Mrs. *Loveden*: and the deponent,
" not choosing to say he had met her with Mr.
" *Barker*, said he had not seen her; upon which
" Mrs. *Stephens* said she had lost her."—So that
she had contrived to quit this lady and to join
Mr. *Barker*, and to walk with him in the manner
which these witnesses have described.

There is another witness to whose evidence I
will advert, and that is *M'Nicol*. Something of an
objection was taken to his evidence as a witness,

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from what appeared upon an interrogatory, that he had had a quarrel with Mr. *Loveden*, on account of his having bartered some fruit for some seeds.—I do not think that that can be admitted to affect the testimony of this witness in any degree: it is known that those things are on a different footing in different families; it is a confidence reposed in gardeners in some families to make exchanges; and a man acting fairly and for the advantage of his master's concerns would not be in the least degree discredited by it: and if he supposed that his authority went further than it did, that cannot be considered as a circumstance at all invalidating his testimony as a witness—least of all would it give a favourable bias to his testimony towards the person who had so resented the liberty he had taken. He says, "He observed there was a great degree of "intimacy between Mr. *Barker* and Mrs. *Loveden*, "for they were in the habit of walking together "and alone arm-in-arm in the flower-garden and "pleasure-grounds at *Buscot Park*, on every oc-"casion they could find so to do: that, from the "manner in which they met at times in the planta-"tions and in the garden, he had no doubt but that "they met there by appointment:"—He says, "That he remarked that when Mr. *Barker* was visit-"ing at *Buscot*, Mrs. *Loveden* used to get up in a "morning much earlier than was her usual cus-"tom, and to come into the flower-garden, where "she was always met by Mr. *Barker*, and that "they used to walk there together and alone till "Mr. *Loveden*'s bell was rung; and whenever the "deponent was in the garden at such times, and "was near enough to hear the bell, he always ob-"served that they separated, and Mrs. *Loveden*

"went

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"went into the house; for it was then known that "Mr. *Loveden* had got up: and he has at times "found them walking together in the planta- "tions, when it was not known in the house that "Mr. *Barker* had come there; and on one day in "particular he well recollects—" That goes to a fact which I shall have occasion to observe upon by and by.

There are other witnesses that speak to situations exactly of the same kind, and as situations frequently occurring between these parties. Now I do confess that, upon a view of this general evidence applying to the general conduct of these parties to each other, I am very much inclined to accede to the doctrine which has been stated by the counsel for Mr. *Loveden*, that it would justify the legal conclusion that adultery had been committed if any situations were shown in which the fact was at all likely to have passed. It would be, I think, a doctrine extremely dangerous to the security of domestic life, if all this could pass without warranting such a conclusion. What!—when an improper attachment is admitted to have existed between the parties—when it is admitted that indelicate acts have passed between the parties when they were within the reach of observation, shall it not be concluded that those acts were carried much further when they were out of the reach of observation? I am not ignorant what allowances are to be made for the laxity of modern manners; but does it in practice or in reason extend to liberties of the kind described, without subjecting the parties to unfavourable conclusions, if they are found in situations in which they are withdrawn from the eye of an observer? I think

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the law would lose sight of that justice by which it is to regulate the rights of individuals, if it were to hold that all this took place, and that nothing further passed when the parties were entirely unrestrained by the eyes of any persons whatever.

However, the matter does not rest here: the evidence goes a great deal further; and is such as, I think, to leave but little doubt upon the minds of those who have to consider its effect. I mean particularly here to allude to the clandestine correspondence which has been produced. The fact that any correspondence whatever, unknown to the husband, had passed between this lady and Mr. *Barker*, would of itself be highly suspicious; even if its nature and its tenor were wholly unknown, it would have been open to the most unfavourable conclusions regarding that nature and tenor. But how is it conducted? Why, it appears that in the country she was in the habit of putting letters directed to this gentleman privately into the bag, —letters not directed by her husband, though a member of parliament. It appears that she was in the habit of receiving letters not addressed to her husband, but separately to herself; that she was in the habit of receiving them with great eagerness; and, in the latter period of the history, that she was in the continued practice of getting the bag before it was produced to her husband or to any body else; that in town she herself put letters directed to this gentleman into the receiving offices, or delivered them herself to the postman with her own hand; some of these letters are sufficiently proved to have been directed to this gentleman. All these facts are established very fully by *Stratton*, by *Chamberlain*, by *Hooper*, by

M^cNicol,

M^cNicol, and by *Dyke*.—Now under such circumstances as these, I think all conclusions must be unfavourable.

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The correspondence of a young married woman with a young man, unknown to her husband, is what I presume hardly comes within the known latitude of modern manners; but, connected with the general footing on which these parties, by all the evidence to which I have alluded, were proved to have stood, it speaks a more decisive language with respect to its nature. But, however, it does happen in this case that letters have been intercepted, and are within the view of the court; the time and the manner of their being brought to light and their authenticity are fully proved. They were taken out of the bag:—and without entering into the particulars, there is very sufficient evidence that they were written on the 26th of *November* 1808; that they were put into the bag by her; that *Hooper*, having suspicions that there were letters passing from her to Mr. *Barker* in this bag, contrived to get these letters out of the bag; that he communicated those letters to some others of the servants, particularly to *Haynes*, with whom he appears upon a footing of intimacy, and that they were afterwards delivered up to Mr. *Pryse*, the son-in-law, upon the discovery which took place some time afterwards. I think their identity is clearly established by this witness, and by the other witness who has proved their contents, and by Mr. *Pryse* himself; and I see nothing which at all shocks probability in the idea of his having kept those letters by him so long. They are letters which it might puzzle such a man as this to determine

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how to produce till some opportunity offered; and he appears to have been unwilling to awaken the feelings of his master upon the subject: he waited for an opportunity of seeing Mr. *Pryse*, and then he took the opportunity of communicating them immediately.

The handwriting of the letters is proved, and they are proved to have been written upon a frank of Mr. *Loveden*'s. The larger letter contains two inclosures; the larger letter is itself declaratory of violent and of mutual attachment; it concludes with desiring and hoping that they may affectionately love, that their attachment may be co-eternal, and that they may affectionately live and die adoring one another: it describes in terms of great lamentation the difficulty of access to the former rendezvous, for that the access and retreat were become too visible from felling the woods in the shrubbery: it relates her repairing to different out-buildings in order to ascertain whether a meeting might be accomplished in them; but complains that the barn is locked, and that the other hovels are unfit for any one to enter: he is desired to devise a scheme to meet; and he is told that in the day-time there is no possibility of escaping detection, from the curiosity of servants and other prying persons; that she has a difficulty in inviting the danger of a night's attempt, but thinks that from the hall window there is no doubt of admitting him quietly for an hour or two.

In this letter there is one envelope dated in *May* 1804, and which, she says, will speak for itself; and that I suppose it might do to persons who understood the transactions to which it alludes; but to be sure there is nothing in that letter

letter itself which does show how it comes to be there with that particular date affixed to it. The other is sealed up intelligence to explain to him what it is essential for him to know. To be sure that is a letter which speaks for itself, without reference to any external transactions. It is a letter which from public decency was not permitted to be read in this Court; but I feel that my public duty calls upon me to state so much as this—that it does contain an account of the times in which the periodical indisposition of the sex visits her, and when she says she must avoid intercourse: she promises to mark the period in future, so that he may always compute it without difficulty; and she desires him to consider this communication as most indulgent, as she certainly had a right to do, and most explicit.

This is a letter which I think requires no comment whatever. It is admitted that it does contain a declaration of violent attachment on the part of the writer; but it is said that there is no proof of any adultery having been committed between them. I confess I cannot help considering such a letter in a very different light, and that it does connect itself with a direct acknowledgment of facts of adultery having passed between these parties. There are only three possible suppositions in which such a letter as this can be conceived to have dropped from the pen of the writer. One of those is, that it may have been written by a woman in a state of absolute insanity, with a mind disordered, and indulging itself with vicious images that have no connexion with any reality and fact: —that is a possible case undoubtedly. It is another possible case, that such a letter might be written by a woman with the malicious intent of defaming

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the character of a virtuous man, to whom such letter might appear to be addressed, but who had no such connexion whatever as those letters import: that is a possible case. But that either of these suppositions exist in the present case is out of all question; nobody imputes that this lady had any thing in the nature of lunacy; nobody imputes that she had any malicious design against the reputation of this gentleman, who was the object of her ardent attachment.

Then what is the only other supposition to which the Court can allude?—That it was written by a woman, and could be written by no other than by a woman, who had made a surrender of her body, her mind, and every thing which belonged to either the one or the other, to the person to whom this letter was addressed. Here is an act, and a proximate act it is undoubtedly, as connected with something which had passed between the parties before; because it is impossible to conceive that a woman would write such a letter as this, saving in one of the two possible cases which I have excluded from all consideration as applying to the present case. It is quite impossible to conceive that such a letter could be written by a woman who had not, in the most unreserved manner, submitted her person to him to whom it is written. It appears a matter of a stronger nature than that which we hold here to be a direct proof of adultery,—the having gone to a brothel with a person. The act of going to a house of ill-fame is characterized by our old saying, that people do not go there to say their paternoster; that it is impossible they can have gone there for any but improper purposes; and that is universally held a proof of adultery. But many persons would

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go to a brothel who could not bring themselves up to the writing a letter of this kind. It is a letter that proves, in the most striking and conclusive manner, not only that the parties must be contriving for future indulgences, but that there had been that sort of intercourse which alone could have produced such a familiarity, and which alone could have emboldened a woman to describe in terms which I do not repeat, that which certainly showed, beyond all question, the fact that these parties had been so connected together.

After such letters as these are proved, the proof of facts might appear superfluous; and I think it is super-abundant in this case. There are meetings, both prior and subsequent to the date of these letters, in which the commission of adulterous acts must be inferred. I do not say that from every one of these acts I would draw the same conclusions in the case of all individuals to whom no such history applied; but that is not the way in which evidence is to be considered. Other facts and other circumstances are explanatory of meetings which are doubtful in their own nature, and capable of candid interpretations:—they define appearances that might otherwise be ambiguous. These letters are a gloss or a running comment, I think, upon the text which occurs in the history of these parties: they are decisive of the terms upon which these parties met:—and that the writer of these letters could meet privately, and out of the reach of observation, the person to whom they are addressed, without any view to the purposes these letters express, is impossible to be conceived; and I think it is not less impossible that they should have met in the manner described, without his

having

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having concurred in effecting those purposes: for though these letters never reached Mr. *Barker*, I cannot but think that the probability highly is, that verbal communications were, in the opportunities which afterwards presented themselves, made upon this subject, agreeably, as she says, to his directions, and agreeably to her inclination to give the communication that was wanted.

The first fact that occurred to which I shall advert, is one that happened at *Kingston House*, and which is spoken to by *Hastings*, upon the 7th article. It appears that Mr. *Loveden*, who is a member of parliament, had left the country in the month of *February* 1807, and went to reside at a house at *Knightsbridge* called *Kingston House*, where he continued 'till about the 4th of *July* in that year, when the family returned to *Buscot*:—that Mr. *Barker* dined twice while Mr. *Loveden* was there:—that in the month of *May*, Mr. *Loveden* went down to *Shaftsbury*, on the occasion of the general election which took place at that time, and that Mr. *Barker* came twice to *Kingston House* during Mr. *Loveden's* absence:—that on the first of such visits Mr. *Barker* came with a gentleman, who remained for some time in a room in front of the House, and Mr. *Barker* and Mrs. *Loveden* remained alone together for about three quarters of an hour, without being seen by the witness; and that he then went away, and let himself out. It is said, Cannot people go into decent rooms in a decent house without being suspected?—Yes, certainly, if they are decent persons; but if such an intercourse is proved between them as is established by the fact of this correspoedence, and by the other facts to which I have alluded.—

I say

I say the fact of such parties being close together for such a length of time, and unobserved, warrants the conclusion that they have committed the criminal act.

But, however, the next fact is of a stronger kind.—It appears that he then came alone: that Mrs. *Stephens* was with Mrs. *Loveden* at the time, and was sitting with her in the breakfast-parlour, in which she usually received other visitors: that Mr. *Barker* then rang the bell; and just as the deponent had let him in, and was going to announce him, and to show him up stairs, she came running down stairs, having seen him from the breafast-room window, as the deponent supposes, met him in the hall, shook him by the hand, and took him into the green dining-room, which was a back room on the ground floor, with windows opening into and communicating with the garden by five steps; in which room there is an inner room, which had formerly been used as a bed-room, and which was a dark room, having no other than a borrowed light from a water-closet within; so that though the workmen might be employed in the garden at such time, Mrs. *Loveden* and Mr. *Barker* might have retired to such room, and been out of the sight of any persons; and after they had been together and alone in the green dining-room about an hour, and 'till the men employed in the garden had gone to their dinner, they then went into the garden and walked together there for about half an hour; and then Mr. *Barker* let himself out as before." I confess, after what has been proved of these parties, this fact,—that she quitted the company in which she was—that she did not introduce Mr. *Barker* as a visitor

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visitor where all other visitors were received—that she retired with him into a room communicating immediately with a dark room,—and that they there staid alone together in a situation that afforded such facilities; this does impress upon my mind a very strong conclusion that those facilities were not thrown away upon these parties.

The next fact to which I shall advert is that which is spoken to by *Major*, upon the 9th article, as having passed in the barouche: and what he says is this,—"She was much in the habit," he states, "of going about in her carriage in the "streets, and meeting Mr. *Barker* there; and that "he does not remember ever to have seen Mr. "*Barker* get into the said carriage when they "have so met in the street, but once, and that "was in very warm weather in the said year "1807:—that they met in *Bond Street*, where "Mrs. *Loveden* was stopping in her carriage at a "chemist's shop door; that he came up to the "carriage and desired the deponent to open the "same, which he accordingly did, and Mr. *Barker* "then got into the carriage; and she desired to "be driven to a house, a dress or cotton shop, "about two doors beyond *Temple Bar*, on the "right hand side of the way going from *Bond* "*Street;* that they were driven there,—that she "got out of her carriage, went into the shop for "a few minutes and then returned to her carriage "to Mr. *Barker*, and ordered the same to be "driven to *Hyde Park* corner, where Mr. *Barker* "got out of the carriage. That it had been "customary for her to have her carriage, which "was a barouche, open when she rode out, which "she generally did in company with Miss *Love-*

"*den;*

" *den;* but that on this day, which was a very
" warm day, it was kept close or shut up:—that
" when he, the deponent, got down from behind
" the carriage to open the door, to let Mrs. *Loveden*
" out at *Temple Bar*, he observed that the sun-
" blinds were all drawn down, and he observed
" the same when he got down to let Mr. *Barker*
" out of the carriage at *Hyde Park* corner; and
" he then observed that the said Mr. *Barker*
" seemed much confused,—looked about him
" very much,—desired the deponent to make
" haste: and Mrs. *Loveden* appeared much heated
" and very red, that her hair was more tumbled
" and disordered than ever he had before observed
" it. From which he concludes,"—a conclusion
in which I am disposed to concur, from what I
have seen of the nature of the intercourse which
is proved to have subsisted between these parties,—
" and he has not the least doubt," he says, " and
" he in his conscience believes, that whilst they
" were in this carriage they had carnal use and
" knowledge of each others bodies."

The next fact which I shall notice is that which
occurs in the deposition of *M'Nicol.* He says,—
" That one day, happening on a *Sunday*, in the
" summer of 1807, just after the family had
" returned from *London* to *Buscot Park*, Mrs.
" *Loveden* having remained at home whilst her
" husband and his daughter, and the mother of
" Mrs. *Loveden*, had gone to Church, he happening
" to observe that the windows of the green-house
" or conservatory, near the centre thereof, which
" he had himself opened in the morning to give
" air to the exotic plants, were shut, (it being then
" about one o'clock,) and likewise that the inside

" shutters

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"shutters to such windows, which were made to "prevent the effects of the frost, and of inclement seasons injuring the plants, were also "shut-to, he went in at one of the windows which "fronts the west of the house, conceiving that "some of the persons about the grounds had shut "the same through mistake, and on his entering "the said green-house he was very much surprised "to find Mr. *Barker* and Mrs. *Loveden* standing "close together between the plants and the back "wall of the green-house, directly opposite the "windows which were so as aforesaid shut up;— "that on seeing the deponent enter, they stood "close together quite still as if desirous of avoiding "being seen, and the deponent then opened the "shutters and windows and walked away through "one of the windows of the said green-house, and "went through the side door through the colonnade that communicates with the house, and "immediately afterwards met Mr. *Loveden's* carriage in the south front of the House coming "from Church; and having seen Mr. *Loveden* "and his daughter and Mrs. *Lintall* go into the "house, he was desirous of seeing which way "Mr. *Barker* would make his escape from the "house, as he had not a doubt he had been "secretly and clandestinely with Mrs. *Loveden* "that morning in the green-house; and for that "purpose he went round the flower-garden, in "order to see whether Mr. *Barker* would go out "at the back door thereof, as he found he "did not come out at the front door; and just "when the deponent had got half way round to the "back door he met Mr. *Barker*, and saw him "pass the south front of the house in haste; and

"though

" though it was a very warm day, he had a great " coat on buttoned round him, and stooped to " avoid being observed who it was;—that he " looked after him to see whether he had a ser-" vant or a horse waiting for him, or whether he " went towards the stable; but he passed the " road leading to the stable." He says again, " That he had not a doubt,"—and I confess it does not appear to me to be in the least degree an uncharitable conclusion,—" he had not a doubt, " but does verily believe, that whilst Mr. *Barker* " and Mrs. *Loveden* were as aforesaid in the con-" servatory or green-house on the said *Sunday* " forenoon, they then and there had the carnal " use and knowledge of each other's bodies." It is said they were fond of plants; and she is proved particularly to have been very fond of dressing up his room with flowers, and very fond of going to nursery gardens: but I should think they would not go and shut up the windows and shutters of a green-house in order to speculate on plants; that is not the way in which their attention would be exercised; nor can I conceive, after such a circumstance, that that was the object which had brought these persons together in a situation like this.

The next witness to whom I am under the necessity of adverting is *Mary Day*, on the 5th article. The account spoken to by *M^c^Nicol* passed in the year 1807, I think. The facts spoken to by this witness passed in the *Christmas* of that year; for it appears that Mr. *Barker* was in the habit of paying annual visits;—she describes Mrs. *Loveden*'s general conduct in common with all the other witnesses; and it would really be nothing more than repetition

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repetition of the depositions if I were to cite the evidence of all the witnesses that vouch the facts,—that they were fond of being together in the rooms of the House. She says, "Particularly she remem-"bers that on one morning about nine o'clock, "happening a few days after Mr. *Barker* had "come on such visit, and just before Mrs. *Love-"den* had gone down to breakfast, the deponent "having gone up stairs to a closet she had on the "same floor with the bed-rooms, and intending to "go into such of the rooms as had been left by "the persons who had slept therein, and among "them intending to go to Mr. *Barker*'s bed-room, "to make his bed and put the room in order, if he "had then left the same; she on going to his bed-"room door found he had not left his room, but "heard him talk to some person then in his bed-"room with him, who the deponent then supposed "was his own man-servant: but she immediately "found her mistake in that respect; for the man "was below, and came up to his room door with a "trunk which had just come by the coach or some "other conveyance; and making a noise by bring-"ing the trunk up and putting it down at the door "of his master's bed-room, she heard the door "locked within, and the man-servant went away; "and the deponent then well knew that the voice "she heard was the voice of Mrs. *Loveden*: and "from such circumstances she is certain that "Mrs. *Loveden* was then in the said bed-room," that is to say, in the bed-room of this gentleman with the door locked. She says, that she considered this as highly improper; but she cannot take upon herself to say whether the act of adultery was committed. She adhered to the strict

rule

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rule of evidence, that, unless she sees the fact, she will not take upon herself to warrant it.

She says, further, " That on this *Christmas* visit, " Mrs. *Loveden*, and the company then in the house, " having gone up stairs for the purpose of pre- " paring or dressing for dinner, the deponent " having gone up stairs on the bed-room floor to " her aforesaid closet, between the rooms where " Mr. and Mrs. *Loveden* slept and that where " Mr. *Barker* then slept, it being then near din- " ner-time and getting quite dusk, but quite light " enough to see any person in the passage leading " to the bed-rooms, she being then in the closet, " and having the door thereof a little open, was " thereby enabled to see to the end of the passage, " and particularly his bed-room door, without " being herself seen therefrom, for she had no " light with her; and she then observed Mr. " *Barker* come out of his bed-room, which was " nearer the top of the stairs than Mrs. *Loveden*'s " was, and look all around as if to see if any person " was within sight, and then look at the clock a " little, and immediately afterwards saw him go " down stairs, and a few minutes after the depo- " nent heard a footstep come out of Mr. *Barker*'s " bed-room, and down the two steps which led " therefrom, and along the passage past the closet " where the deponent was; and she having the " door open a little a-jar, plainly saw that it was " Mrs. *Loveden* who came out of the said Mr. *Bar-* " *ker*'s bed-room, and saw her go into her own " bed-room,—for she was obliged to pass the " closet in going thereto,—and she clearly and " distinctly saw it was her said mistress;—and her " conduct was so extremely suspicious, that, upon

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" this occasion, she admits that she cannot but " believe that they had at such time been criminally connected together. She says, that upon " several other occasions, she has known Mrs. " *Loveden* and Mr. *Barker* to be alone together " unknown to Mr. *Loveden* during Mr. *Barker*'s " visits at *Buscot Park*, particularly in a room on " the bed-room floor, which was Mrs. *Loveden*'s " dressing-room, but was used as a sitting-room " for ladies only, and was a room where Mrs. " *Loveden* used to write in, and where gentlemen " were not admitted."

Elizabeth Haynes, who was her own woman, speaks to particulars of a similar nature.—She observes that she was particular in dressing herself when this gentleman was expected, more than at other times:—in seeing that his bed-room was put in proper order, and his fire kept up, which she never troubled herself about with other gentlemen; and that from these and other circumstances she was led to suspect they did conceive a criminal passion for each other. Then she goes on to say, " That she had often reason to believe that Mrs. " *Loveden* went in a secret manner into the bed- " room of Mr. *Barker* while he was there, and re- " mained alone with him for some time; for she " remarked of late years their connexion became " more unreserved, particularly while Mr. *Barker* " was on a visit there at *Christmas* 1807, and for a " fortnight or three weeks that Mrs. *Loveden* used " frequently to go up stairs to dress before the " usual time for the afternoon; and when she " went out of her room to go down stairs, she " would not allow the deponent to light her down, " but said she would light herself to the top of the " stairs,

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" stairs, and would put the candle in the room at
" the top of such stairs, called her dressing-room,
" and that the deponent might afterwards fetch it
" away; that she then supposed that Mrs. *Loveden*
" used to go into Mr. *Barker*'s room frequently
" whilst he was so there dressing; and she was
" confirmed in such her suspicions from the cir-
" cumstance of having, on one of the afternoons
" when Mrs. *Loveden* had dressed for dinner
" rather earlier than usual, and had gone out of
" her bed-room for the ostensible purpose of going
" down stairs, heard Mr. *Barker*'s bed-room door
" open, and just about the same time that Mrs.
" *Loveden* could have got there; and that after
" remaining in Mrs. *Loveden*'s room about ten
" minutes, without hearing the said door open
" again, having then gone into a closet which was
" appropriated to the deponent's own use, and is
" in the bed-room passage opposite the house-
" maid's closet, from the door of which she could
" see the steps leading to the recess from which
" Mr. *Barker*'s bed-room door opened, she very
" soon afterwards saw him come out of the said
" bed-room down the said steps in his dressing-
" gown, and walk to the clock directly opposite;
" and having first held the candle up to the clock,
" and looked at it, he then turned and looked
" both ways down the passage, as if to take a sur-
" vey whether any person was within view: seeing
" the deponent, he returned up the steps again, as
" if to go into his bed-room; that she then went
" out of the door leading from the bed-room pas-
" sage to the back stairs, and went so far up the
" back stairs as to enable her to see through a
" partition light over the back stairs door into the

 " passage;

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" passage; and after remaining there about five
" minutes, or not quite so much, she saw the said
" Mrs. *Loveden* come down the said steps leading
" from Mr. *Barker*'s bed-room, without any light,
" and go down the best stairs; so that she is cer-
" tain Mrs. *Loveden* had, at the time deposed to,
" been in Mr. *Barker*'s bed-room whilst he re-
" mained therein, and that they were there alone
" together."

There is another fact she remembers: " That
" on another occasion, happening one afternoon
" whilst this visit took place, Mrs. *Loveden* having
" gone up stairs to dress for dinner, and Mr. *Bar-*
" *ker* having gone into his room, she ordered her,
" *Haynes*, to wait a little, for that she had forgot
" something and must go down stairs, or to that
" effect; and she then took a light in her hand, and
" went out of her bed-room, and pulled her door
" to after her, and went along the passage, as if to
" go down stairs; but the deponent having imme-
" diately opened the door again, heard Mrs. *Love-*
" *den* go up the steps leading to Mr. *Barker*'s bed-
" room, wherein he then was; and the deponent
" being curious to see her come out of Mr. *Bar-*
" *ker*'s room again, went up the aforesaid back
" stairs again, high enough to see the passage of
" the bed-room floor through the partition light
" before described; and in a quarter of an hour
" from the time Mrs. *Loveden* so went into the
" bed-room, she sees from the back stairs the said
" Mrs. *Loveden* come down the steps leading from
" Mr. *Barker*'s room, with the candle and candle-
" stick in her hand, but with the candle ex-
" tinguished, and saw her go from thence into her
" own bed-room."

There is another fact of the like kind that she mentions: "That one morning during Mr. *Barker's* "visit at *Buscot*, at this *Christmas* time, she was "employed in her usual way, being at that time "putting away some things in her aforesaid closet, "and that she saw Mrs. *Loveden* in her riding-"habit, which she frequently wore, coming down "the steps from Mr. *Barker's* room, where he "then was; and she, observing the deponent, "turned back, and went into another room in the "recess to which the steps led, and which was "next to Mr. *Barker's* room, as if she had "forgot something, by way of excuse, as it struck "the deponent, for her coming down those steps; "—that she opened a drawer in such room, and "took out a port-folio with some papers therein, "and gave it the deponent, desiring her to put it "in another closet she had the care of; that she "seemed very much confused, and that she very "soon afterwards saw Mr. *Barker* come out of "his bed-room and go down stairs; and she has "not a doubt that they had been together and "alone in his bed-room, and that they had again "committed adultery together."

I should exhaust my own strength as well as the patience of those who hear me, if I were to go into an enumeration of all the facts, that are proved to have taken place, as between these two persons.—There are two or three of them which I am under the necessity of noticing, and those are the facts which occurred upon the 8th of *August* 1808, and which are spoken to by two or three witnesses, who in all material facts perfectly corroborate each other. There are some little differences, but which, in my opinion, give a support to evidence,

 and

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and do not break in upon it. The witnesses, to whom I now refer are, *Hastings*, *Calcutt* the housekeeper, who had lived long in Mr. *Loveden*'s family, and *Haynes*, her own maid. The person, who gives the most particular account of these circumstances, is a man who seems to have behaved with great zeal for his master's honour, with fidelity, and with considerable prudence and forbearance, and that is *Warren Hastings*. The account which he gives is this. He says, " It was " Mr. *Loveden*'s custom, for many years, to go " to *Abingdon* on the 8th of *August*, to attend " a school-meeting or mayor's feast, and to send " two bucks and dine there; and as it was seven- " teen miles from *Buscot Park*, he used generally " to sleep there, and he did not return till the fol- " lowing day: that it was very well known to his " wife that such was his intention on the 8th of " *August*. That two days, previous to that day, the " deponent had entertained a strong suspicion " that it was the purpose of Mrs. *Loveden* to intro- " duce Mr. *Barker* into the house, on the night " during which Mr. *Loveden* was certainly to be " absent; for he says, that on the 6th of the month, " two days before, she had called to him over " the baluster that she wanted some oil, and that " he the deponent gave some in a table-spoon to " *James Dawson*, then Mrs. *Lintall*'s servant, who " took the same to her; and at the time he gave " it to *James Dawson*, he told *Dawson* that he " knew what she wanted the oil for, and that she " had got some mischief in her head; for his sus- " picions had been awakened on the morning of " the 28th of *July*, from the circumstance of having " observed a noise made in opening the billiard-

" room

" room door, which stuck at the top, and after
" listening a little he heard the door shut again and
" locked; and what more particularly awakened
" his suspicions, and from which he believed that
" Mrs. *Loveden* had had Mr. *Barker* in the house
" that night, was, that she had a carpenter's man
" sent for from *Farringdon* on the 30th of *July*,
" who came and, by her own directions, planed the
" top of the billiard-room door, and made it go
" easy; and from those circumstances he strongly
" suspected that she meant to use this oil for the
" purpose of oiling the doors leading from the bil-
" liard-room to the conservatory or green-house, so
" that she might introduce Mr. *Barker* into the
" house unheard by any person. That accord-
" ingly a few minutes after he went and examined
" all the doors leading from the conservatory into
" the vestibule, through a little room into Mr.
" *Loveden*'s dressing-room, from thence into the
" vestibule, and from thence into the billiard-
" room, and found them every one oiled, and he
" knew that they had not been oiled before that
" time. He says that the next day she asked for
" more oil, which she applied to all the doors lead-
" ing up to her own bed-room." From these cir-
cumstances, and from another circumstance which
he mentions, "That her maid communicated to
" him that her mistress had made rather unusual
" preparations in her bed-room, by getting laven-
" der, hyacinth roots, roses, and other flowers, of
" which Mr. *Barker* was very fond; the deponent
" was pretty certain that that was the night Mrs.
" *Loveden* intended to get Mr. *Barker* into the
" house through the conservatory, and from thence
" by the doors before described; and they agreed

 " to

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" to watch together in order to detect it. Arrange-
" ments were accordingly made, and the house-
" keeper and the lady's maid, among others, were
" to take their stations for the purpose of obser-
" vation. He states, that about eleven o'clock,
" Mrs. *Loveden* having rung the bell to take away
" the supper things, he went into the library for
" that purpose, and found that Mrs. *Loveden* had
" then gone up to her bed-room; and after having
" taken the supper things away, he went down
" stairs again, and sat within his own pantry door,
" having concealed his candle, for the purpose of
" seeing Mrs. *Loveden* let Mr. *Barker* into the
" house, and then they were to surprise him. That
" that night was quite a moonlight night, being
" the full of the moon, and that Mrs. *Loveden*
" could from the windows of her bed-room plainly
" see any person approach the house. That about
" half past eleven o'clock, Mrs. *Loveden* having
" come out of her bed-room into the passage,
" and the female servants having discovered them-
" selves too soon, and having been asked by their
" mistress what they were doing there, for they
" were looking through the baluster of the attic
" story, they told her they were sure there was a
" man in the house, and desired the witness to
" come up stairs and search the house:—he went
" up stairs to the bed-room floor, having first
" locked the back stairs door to prevent the escape
" of any one that way, and he then passed Mrs.
" *Loveden*, who was in her bed-gown and night-
" cap, and leaning with her face in her hands over
" the baluster; that he searched all the rooms on
" the best bed-room floor, but found no person
" therein. There was a candle which had been
" lighted

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" lighted in a room above, which these wit-
" nesses supposed to be a signal to Mr. *Barker*,
" lighted up by Mrs. *Loveden*, to invite him to the
" house, on some agreement they had entered into
" before; but this light was extinguished by the
" wind." He says, " That he went down stairs,
" and that he examined and found nobody; that
" he then went out into the plantations, being con-
" fident that Mr. *Barker* had either approached or
" entered the house though he had not seen
" him, — satisfied that these arrangements which
" had been made were not made for nothing,
" but that he was to be found in the neighbour-
" hood if not in the house. He went into the plan-
" tations, where he was for a considerable time.
" Mrs. *Loveden*, he says, appeared to be greatly
" agitated when he went up to search the rooms,
" and he also saw her looking out of her bed-room
" window, which he concluded was a signal for
" Mr. *Barker* to keep out of sight. After remain-
" ing in the grounds for some time, he came back
" again to the house, but he went out again some
" time afterwards armed with a pistol; and then
" being alarmed by the noise of some person jump-
" ing off the top of the privy or the shed adjoining
" to it, he instantly made for the spot, and there
" he immediately found the gentleman he was in
" search of, Mr. *Barker*. — He told him, You are
" the man I am in search of: and the deponent
" then ordered him immediately off the premises,
" and said he was astonished at his boldness in at-
" tempting to enter the house at such a time; and
" Mr. *Barker* seeing the deponent was in great
" passion, begged him not to be so loud, and en-
" treated the deponent to let him go under Mrs.
" *Loveden*'s

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" *Loveden*'s window just to speak to her by way of " explaining himself, and said that he should hear " every word he had to say: he refused his re- " quest, and he then again repeated it: he was at " last induced to consent that he might speak to " Mrs. *Loveden* at her window: he walked with " him along part of the front of the house; but " before they got under the window, Mrs. *Loveden* " had shut her shutters close," having before been from her windows eagerly observing this witness's motions. " Mr. *Barker* declined going on, saying " that the servants might be on the watch, and " might hear what he had to say; and Mr. *Barker* " then said he wished to speak to the deponent, " and drew him for that purpose under the elm " trees, where they remained in conversation " together near three quarters of an hour. *Hast-* " *ings* reproached Mr. *Barker* with ingratitude to " Mr. *Loveden*, in coming to disturb his peace of " mind and the peace of his family, who had " always treated him in the most friendly manner; " and then told him his conduct towards Mrs. *Love-* " *den* on the preceding *Christmas* had been noticed " by all the company; which he said he knew: " and the deponent added, that the under-game- " keeper had seen him in a familiar or unbecoming " situation with Mrs. *Loveden*, and had talked of " it all over the country; and that another per- " son, *Miller*, a horse-dealer, had mentioned it at " the public markets, and so on. He admitted that " he had been so seen; and the deponent told him " he knew that his own father (that is Mr. *Barker*, " sen.) had given orders that he should not visit " the family any more; and added, that on ac- " count of such the conduct of Mrs. *Loveden* and

" Mr.

" Mr. *Barker* to each other, neither his father nor
" his family had for some time visited at *Buscot*
" *House*, as they had before done when on a
" friendly intimacy. Mr. *Barker* admitted the
" truth of all he said ; and *Hastings* told him that
" pursuing that line of conduct would be the ruin
" of the peace of mind of Mrs. *Loveden* and her
" mother and family. He asked him how he dared
" approach the house, and for what purpose he
" came. He made some excuse that he merely
" wanted to speak to Mrs. *Loveden*, to caution her
" not to write to him any more : —he said that the
" story would not do.—The conversation pro-
" ceeded : and at last he promised him (the depo-
" nent having positively declared he would inform
" Mr. *Loveden* of the discovery he had made if he,
" Mr. *Barker*, ever came to the house any more)
" that he would pledge himself he never would
" come again. He shook the deponent by the
" hand, and accordingly gave his word of honour
" that he never more would come to the house;
" soon after which they parted." It appeared
that this man kept his word ; for when he came
into the house he told the other servants, who were
in the confederacy with him to discover Mr. *Barker*, that he had never seen him. They, however, had their suspicions ; for it appears, from
the evidence of *Monk* and others, that they suspected *Hastings* had actually surprised Mr. *Barker*
in the garden.

The next morning *Rachael Monk* came to him in
his bed-room, and told him Mrs. *Loveden* wished to
speak to him. On his entering her dressing-room,
she first desired him to shut the room-door. He
remonstrated against this. She said she had been
wrong

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wrong in sending for him so early, and by the house-maid, who knew nothing of what had passed on the preceding night. He says, "That she "then came close to the deponent, and crying "very much, said, O *Hastings*, what a miserable "night I have passed! I am a ruined woman for "ever. Upon which the deponent told her that "her conduct had been very imprudent; that he "had been watching for three nights, and that "he knew Mr. *Barker* was coming, and that she "was to have let him in from the conservatory, "through the dressing-room and the billiard-room, "and that she had oiled the locks and hinges of "the doors of those rooms leading to the con-"servatory, to prevent their making a noise; and "he also spoke of the wax candle which she had "burning on the hearth of her said dressing-room; "and said he knew she was first to have taken "Mr. *Barker* into such dressing room, and after-"wards into her bed-room. She confessed to the "deponent she had oiled the locks of the doors, "that she had intended to have introduced Mr. "*Barker* into the house, and into the room in "the way above mentioned, but that she would "never do so again, and would keep no corre-"spondence with him, and begged and prayed of "the deponent that he would conceal from her "husband and every person what had so passed "the preceding night: which he did."

Here is the direct acknowledgment of both parties, at least going to the extent of nocturnal and clandestine meetings; and from the other facts there can be no doubt whatever of the intention of such a meeting as this. Is not the proof of a young man, being privately introduced into

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into the house, evidence of the fact of adultery passing? It is said in this case, it was prevented. And so it might be. But if it shall appear that other clandestine and nocturnal meetings are contrived, and did actually take place, there can be no doubt what conclusion in reason, and law, and justice, ought to follow from the facts here stated; namely, the concert of the parties, and the fact that took place in consequence of this concert. It does appear certainly that for some time after this, great caution was observed. I think nothing further appears during that year, except the writing these letters, which took place in the *November* following. In these letters she laments the difficulties under which their connexion was laid by the alteration of the grounds, which had made every part of them visible to every eye; that it was impossible, therefore, for them to take advantage of the plantations and shrubberies; that the hovels were unfit to enter, and the barns kept locked: but she intimates, in that letter, that there was a possibility of his being admitted at the hall window.

The occurrence next referred to is that which took place in the month of *March* 1809. Mr. *Loveden* was in the habit of going to visit his son Mr. *Pryse*, at *Woodstock*. Mrs. *Loveden* declined paying this visit in company with him: and then the facts occurred which led to the open disclosure of all this intercourse, which had now been going on, certainly for a considerable number of years, utterly unknown to the master of this family. The person, to whose evidence I shall principally resort in this case, is *Hastings*,—he being corroborated, as he is, by all the other witnesses, particularly by

Haynes

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Haynes and by *Calcutt*, in the most exact manner. He says, that upon the 8th of *March* Mr. *Loveden* went to his son-in-law's;—that she declined the invitation given to her to accompany her husband;—that the day after Mr. *Loveden* set off for *Woodstock*, Mrs. *Loveden* dressed herself in a most elegant manner, and more so than she was accustomed to do: that is proved also by the other witnesses;—and that she used to dizen and adorn herself; and that she was very much in the habit of doing so while her husband was absent: and it appears that attentions to her person were very much recommended to her by Mr. *Barker*, so far as one can judge from the letters which are produced. He says, that *Elizabeth Haynes* having communicated to him that Mr. *Barker* had been introduced into the house secretly, and had slept with Mrs. *Loveden* on the nights of *Wednesday* and *Thursday*, the 8th and 9th; and *Hannah Calcutt* having locked all the doors on the ground-floor, they were at a loss to know how he could possibly have got into the house. The suspicion of this witness being, that it must have been by means of the hall window from the steps on the outside, and that Mrs. *Loveden* concealed him in a room called the study, upon the ground-floor; the maids, to whom he communicated this suspicion, told him that it was quite impossible, for that nobody but Mr. *Loveden* was thought to have a key of the study. He, however, was satisfied that must have been the place in which she concealed him, and that she must have a key of the study for that purpose. That she had a key is clear; for it appears that, on a communication subsequently made to her of the discovery, she delivered up the key

key to Mr. *Pryse*, in answer to his demand. He determined to watch in the butler's pantry on the *Friday* night, being the 10th of the month of *March*, to discover if Mr. *Barker* or any person was let into the house by the hall window, which he could plainly hear from that place; that he accordingly took his stand there about six o'clock in the evening of this day; that he continued there 'till about half past nine, except when he went to answer the bell in the library; that whilst he was on the watch, just at nine o'clock, the kitchen-maid having opened the deponent's pantry door where he was sitting, he at that instant saw Mrs. *Loveden* run down the vestibule stairs leading to the billiard-room, and unlock the billiard-room door, which is on the basement story; and after having heard her open a book-case therein, she immediately ran up stairs; he saw her run across the great hall, and open the shutters and throw up the sash of the east window of the said hall; that he then plainly heard some person alight from the said hall window on the floor, and instantly heard Mrs. *Loveden* and the person whom she had so let in walk through the breakfast room to the study door, which he then heard unlocked and two persons go therein. He says that his bed-room is under part of this study, and in order that he might with greater certainty hear what passed in the study over head, he got upon the table so as to raise himself nearer to the floor; that he heard a person, who he was sure was Mrs. *Loveden*, go out of the study and lock the door thereof on the outside in the breakfast room, and go from thence into the library and shut the door thereof; and after that, he plainly heard a person move over head

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head in the study; and the library bell having then rung, he took up a glass of wine: that he took the opportunity of looking through the key-hole of the study to see if there was a light in the study; but he was prevented from so doing by the key-hole being stopped in the inside by paper. He says that he then opened the mahogany door which leads into the hall from the grand stair-case, by means of which being left open the passage through the house from the stair-case hall is lighted by a large reflecting lamp in the stair-case hall, the said door being always left open for such purpose: he had observed it had been shut once or twice that night by some person, although he had as often set it open again:—that he then went down stairs, told the housekeeper and the other persons who were on the watch, that he was very certain a person was there, but that they would not believe him; that they said it was quite impossible—he, however, said he was confident of it:—that he saw the mahogany door which he had opened was again shut. That he took up the supper to Mrs. *Loveden* about ten o'clock; that he then found the mahogany door again set open; from which circumstance, and from afterwards having listened in his bed-room, he verily believes that Mrs. *Loveden* had taken such person from the study up stairs into her own bed-room; and he is confirmed in that belief by his having heard two persons in Mrs. *Loveden's* bed-room after she had gone up stairs to bed about eleven o'clock at night: and he is very certain that at that time he heard the conversation of two persons in her bed-room. *Haynes* was below stairs, because they had been both together there;

there; and he says that Mrs. *Loveden* having rung her bell, *Haynes*, who was below stairs in the house-keeper's room, went up to answer the same; and before she could get up stairs he heard Mrs. *Loveden* run across her bed-room several times in great haste. He sat up watching till two o'clock, but saw nothing further.

The next witness who comes in here in the order of time of the transaction, is *Haynes*, the maid: and she says, that her mistress had been dressed much more gaily that day than at other times; that she went to bed much earlier than she had been accustomed to do; that when she attended to put her to-bed as usual, she observed that Mrs. *Loveden* seemed much confused, and acted strangely; that instead of lying on her own side of the bed when she got therein, as she used to do, she lay quite in the middle of the bed, as if to tumble it more than usual, and directed the deponent to draw the curtains close to the feet of the bed, which she never before had done; from which she had her suspicions that he was to be admitted on these nights; and that they having communicated their observations to each other, that she had had her bed-room put in more order—had removed several useless things,—had got flowers in her room, and that she appeared confused and agitated, and that she, the witness, being informed that night by *Hastings*, that he had heard Mrs. *Loveden* let Mr. *Barker* into the study, about nine o'clock at night, and that he could hear him move therein; she was led more particularly to notice the conduct of Mrs. *Loveden* when she attended as usual to put her to-bed. That about eleven o'clock Mrs. *Loveden* having got up to her bed-room and rung her

 bell,

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bell, she attended her in her bed-room to put her to-bed, and during the time she was so doing she observed Mrs. *Loveden* to be extremely flurried and confused; that she kept her eyes upon the deponent whenever she moved, and particularly when she went near the windows, the curtains of which were drawn, which the deponent then thought was very suspicious: and on the following morning, being *Saturday*, the 11th of the month, when the deponent went at the usual hour, she observed that she looked very much confused, and she particularly noticed that the bed was extremely tumbled, and had the appearance of two persons having lain therein on the preceding night.

On the next morning it appears that *Hastings* being fully satisfied that there was a person in the study, who had returned by that time to it, she being seen carrying breakfast things into that study, and it being cold, and it therefore being probable there would be some fire, he was curious to observe whether there would be any smoke issuing out of the study chimney: he went and saw there was, and he then went and made a demand of the key from Mrs. *Loveden*. She resisted, —he said he was sure there was a fire in the room — she said there was none—he said he was certain there was—she said if there was it could do no mischief, that it was so strongly divided from the other rooms that no injury could ensue—she affected to look through the key-hole, and ridiculed their fears.—He said it was impossible she should see any thing, because the key-hole was stopped: and at last he insisted on breaking open the door, for that the party, of whom he was in quest, was there. She resisted this a good while;

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and he was after a long time persuaded to take another course; namely, to call in the assistance of some carpenters who were at work: they opened the windows of that room, and therein was found Mr. *Barker* endeavouring to conceal himself by standing up as close as he could to the wall.— Upon that the disclosure took full effect—the door was afterwards opened, and conversations passed, in which there was a full admission that he had come into the house the night before, and that he had been in the house, and was so introduced by this lady. A servant was immediately sent off with a communication to Mr. *Pryse* at *Woodstock*, who communicated it afterwards to the husband: and steps have been taken since, which bring this cause for a separation before this Court.

Upon the whole of this evidence, the difficulty which has really occurred to me, is to conceive how there can be a doubt of the fact—it appears to me hardly possible—it is evidence, so far as I see, that is hardly capable of explanation or observation; and it is, in itself, so direct and consistent, that no observation can apply it more closely to the conviction of any man's mind that has occasion to peruse it.

It has been said, that either there has been no verdict in this case, or that, if an action was brought it must be presumed that the verdict was unfavourable to Mr. *Loveden;* because it is not, as usual, noticed in the proceedings in this cause. Certainly it is usual to plead the verdict where damages have been obtained against the adulterer; but it will be recollected that the introduction of

 verdicts

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verdicts was long resisted in this Court, and it is now perfectly understood that they are introduced merely as circumstances of evidence; and that a party does not stand upon a higher footing in a case here agitated between different parties and upon other evidence. Judicially I am not informed whether any verdict of any kind was obtained; but supposing the fact to be as understood, that an action was brought, and that there was a failure in that action, that is not a matter from which any thing can be drawn to the prejudice of the evidence that has been adduced here.—What produced the failure there, it is not for me to speculate upon—whether it arose from any negligence on the part of Mr. *Loveden*, or of his agents—whether from any undue confidence in the sufficiency of the evidence which he there adduced—whether much of the evidence which is here adduced might be adducible there.

The letters, I presume, which are demonstration against this lady here, would not be, in their present form, evidence against him, for they are letters which he never received. Whether, if they had been actually received by Mr. *Barker*, and he, after the receipt of such letters as these, had continued that sort of intercourse with this lady, which is here proved to have existed, the receipt of such letters, coupled with his conduct after the receipt of them, might not have been admitted consistently with the rules by which the wisdom of those courts regulates the admission of evidence, it is not for me to say. But, however, that case failed. It is a matter, however, that is utterly out of the view of this Court,

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Court, and out of all further explanation here, and nothing that passed there can affect the sufficiency of evidence here, if the evidence adduced here is sufficient to bring one's mind fairly to the conclusion; for it is upon the evidence adduced here that the cause must here be determined.

I am most clearly of opinion that the evidence adduced here must lead to the conclusion of adultery. I am most perfectly satisfied that repeated acts of adultery have been committed between these parties; that an adulterous connection subsisted between them for a very considerable length of time; and that Mr. *Loveden* is most unquestionably entitled to the sentence which he prays, — of separation by reason of the repeated acts of adultery which have taken place.

Affirmed, on Appeal, 20th *Feb.* 1811.

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Marriage,—by contract without religious celebration, according to the law of Scotland, held to be valid: Distinction, as to the state of one of the parties, being an English officer on service in that country, not sustained.

THIS was a case of restitution of conjugal rights, brought by the wife against the husband, in which the chief point in discussion was, the validity of a *Scotch marriage, per verba de præsenti,* and without religious celebration: one of the parties being an *English* gentleman, not otherwise resident in *Scotland,* than as quartered with his regiment in that country.

JUDGMENT.

Sir *William Scott.*—The facts of this case, which I shall enter upon without preface, are these: Mr. *John William Henry Dalrymple* is the son of a *Scotch* noble family; I find no direct evidence which fixes his birth in *England,* but he is proved to have been brought up from very early years in this country. At the age of nineteen, being a cornet in his majesty's dragoon guards, he went with his regiment to *Scotland* in the latter end of *March,* or beginning of *April* 1804, and was quartered in and near *Edinburgh* during his residence in that country. Shortly after his arrival, he became acquainted with Miss *Johanna Gordon,* the daughter of a gentleman in a respectable condition of life. What her age was does not directly appear, she being described as of the age of twenty-one years *and upwards:* she was however young enough to excite a passion in his breast, and it appears that she made him a return of her affections: he visited frequently at her father's house in *Edinburgh,*

Edinburgh, and at his seat in the country, at a place called *Braid*. A paper without date, marked No. 1, is produced by her: it contains a mutual *promise* of marriage, and is superscribed, "a sa-"creed promise." A second paper, No. 2, produced by her, dated *May* 28, 1804, contains a mutual *declaration* and *acknowledgment* of a marriage.—A third paper, No. 10, produced by her, dated *July* 11, 1804, contains a *renewed declaration* of marriage made by him, and accompanied by a promise of acknowledging her, the moment he has it in his power; and an engagement on her part, that nothing but the greatest necessity shall compel her to publish this marriage. These two latter papers were inclosed in an envelope, inscribed "*Sacreed Promises and Engagements*," and all the three papers are admitted, or proved in the cause, to be of the hand-writing of the parties, whose writing they purport to be.

It appears that Mr. *Dalrymple* had strong reasons for supposing, that his father and family would disapprove of this connection, and to a degree that might seriously affect his fortunes; he, therefore, in his letters to Miss *Gordon*, repeatedly enjoined this obligation of the strictest secrecy; and she observed it, even to the extent of making no communication of their mutual engagements to her father's family; though the attachment, and the intercourse founded upon it, did not pass unobserved by one of her sisters, and also by the servants, who suspected that there were secret ties, and that they *were* either already, or soon *would be* married.—He wrote many letters to her, which are exhibited in the cause, expressive of the warmest and most devoted passion, and of unalterable fidelity to his engagements, in almost all of them applying the

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terms of husband and wife to himself and her.— It appears that they were in the habit of having clandestine nocturnal interviews, both at *Edinburgh* and *Braid*, to which frequent allusions are made in these letters. One of the most remarkable of these nocturnal interviews, passed on the 6th of *July* at *Edinburgh*, where she was left alone with two or three servants, having declined to accompany her father and family (much to her father's dissatisfaction) to his country-house at *Braid*. There is proof enough to establish the fact, in my opinion, that he remained with her the whole of that night. He continued to write letters of a passionate and even conjugal import, and to pay nocturnal and clandestine visits during the whole of his stay in *Scotland;* but there was no cohabitation of a more visible kind, nor any habit and repute, as far as appears, but what existed in the surmises of the servants and of the sister. His stay in that country was shortened by his father, who came down, alarmed, as it should seem, by the report of what was going on, and removed him to *England* on or about the 21st of *July*.

The correspondence appears to have slackened, though the language continued equally ardent, if I judge only from the number exhibited of the letters written after his return; though it is possible, and indeed very probable, there may be many more which are not exhibited, No letters of Miss *Gordon*'s, addressed to him, are produced; he has not produced them, and she has not called for their production. In *England* he continued till 1805, when he sailed for *Malta:* his last letter, written to her on the eve of his departure, reinforces his injunctions of secrecy; and conjures her to withhold all credit from reports, that might reach her

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of any transfer of his affections to another: it likewise points out a channel, for their future correspondence, through the instrumentality of Sir *Rupert George*, the first Commissioner of the Board of Transports. He continued abroad till *May* 1808, with the exception of a month or two in the autumn of 1806, when he returned for a purpose unconnected with this history, unknown to his father, and, as it appears, to this lady. It is upon this occasion, that the alteration of his affection first discloses itself in conversations with a Mr. *Hawkins*, a friend of his family, to whom he gives some account of the connection which he had formed with Miss *Gordon* in *Scotland*, complains of the consequences of it, in being tormented with letters from her, which he was resolved never to read in future; and having reason to fear she would write others to his father, he requested Mr. *Hawkins*, to use all means of intercepting any letters, which she might write either to the one or the other.

Mr. *Hawkins* executed this commission by intercepting many letters so addressed; though, in consequence of her extreme importunity, he forwarded two or three, as he believes, of those addressed to Mr. *Dalrymple*; and he at length wrote to her himself, about the end of 1806, or beginning of 1807, and strongly urged her to desist from troubling General *Dalrymple* with letters. This led to a correspondence between her and Mr. *Hawkins*; and it was not till the death of Mr. *Dalrymple*'s father (which happened in the spring of the year 1807) that she then asserted her marriage rights, and furnished him with copies of these important papers, which she denominates, according to the style of the law of *Scotland*, her "Marriage Lines." She took no steps to enforce her

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her rights by any process of law. Upon the unlooked-for return of Mr. *Dalrymple*, in the latter end of *May* 1808, he immediately visited Mr. *Hawkins*, who communicated what had passed by letter between himself and Miss *Gordon;* and suffered him, though not without reluctance, to possess himself of two of her letters, which Mr. *Dalrymple* has exhibited. Mr. *Hawkins* however dismissed him with the most anxious advice to adhere to the connection he had formed; and by no means to attempt to involve any other female in the misery, that must attend any new matrimonial connection. Within a very few days afterwards, Mr. *Dalrymple* marries Miss *Laura Manners*, in the most formal and regular manner. Miss *Gordon*, who had before heard some reports of no very definite nature, instantly, upon hearing authentic news of this event, takes measures for enforcing her rights; and being informed that he is amenable only to this jurisdiction, she immediately applies for its aid, to enforce the performance of what she considers as a *marriage contract*.

The cause has proceeded regularly on both sides, and has been instructed with a large mass of evidence, much of it replete with legal erudition, for which the Court has to acknowledge great obligations to the gentlemen, who have been examined in *Scotland*.* It has also been argued with great industry and ability by the counsel on both sides, and now stands for final judgment. Being entertained in an *English* Court, it must be adjudicated according to the principles of *English* law,

* It has been deemed proper, that this Information, with the Evidence, should accompany the Report of this Case: It has therefore been printed in the Appendix.

applicable

applicable to such a case. But the only principle applicable to such a case by the law of *England*, is, that the validity of Miss *Gordon*'s marriage rights must be tried by reference to the law of the country, where, if they exist at all, they had their origin. Having furnished this principle, the law of *England* withdraws altogether, and leaves the legal question to the exclusive judgment of the law of *Scotland.*

I am not aware that the case so brought here is exposed to any serious disadvantage, beyond that which it must unavoidably sustain in the inferior qualifications of the person, who has to decide upon it, to the talents of the eminent men, to whose judgment it would have been submitted, in its more natural Forum. The law-learning of *Scotland* has been copiously transmitted; the facts of the case are examinable on principles common to the law of both countries, and indeed to all systems of law. It is described as an advantage lost, that Miss *Manners*, the lady of the second marriage, is not here made a party to the suit; she might have been so in point of form, if she had chosen to intervene; in substance she *is;* for her marriage is distinctly pleaded and proved, and is as much therefore under the eye, and under the attention, and under the protection of the Court, as if she were formally a party to the question respecting the validity of this marriage, which is in effect to decide upon the validity of her own. For I take it to be a position beyond the reach of all argument and contradiction, that if the *Scotch* marriage be legally good, the second or *English* marriage must be legally bad. Another advantage intimated to be lost is this, that the Native Forum would

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would have compelled the production of her letters to him, for the purpose of seeing whether any thing in them favoured his interpretation of the transaction. Surely, according to any mode of proceeding, there can be no need of a compulsory process, to extract them from the person, in whose possession they must be, if they exist at all. If they contain such matter as would favour such an interpretation, he must be eager to produce them, for they would constitute his defence; not being produced, the necessary conclusion is, either that they do not exist, or that they contain nothing, which he could use with any advantage for such a purpose. The considerations that apply to the indiscretions of youth, to the habits of a military profession, and to the ignorance of the law of *Scotland*, arising from a foreign birth and education, are common to both, and I might say, to all systems of law. They are circumstances, which are not to be left entirely out of the consideration of the Court, in weighing the evidence for the establishment of the facts, but have no powerful effect upon the legal nature of the transaction when established.

The law, which, in both countries, allows the minor to marry, attributes to him, in a way which cannot be legally averred against, upon the mere ground of youth and inexperience, a competent discretion to dispose of himself in marriage; he is arrived at years of discretion, *quoad hoc*, whatever he may be with respect to other transactions of life, and he cannot be heard to plead the indiscretion of minority. Still less can the habits of a particular profession, exonerate a man from the general obligations of law. And with respect to any ignorance arising from foreign birth and education,

tion, it is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country, engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party, who has engaged under a proper knowledge, and sense of the obligation, which the law would impose upon him by virtue of that engagement. According to the judgment of all the learned gentlemen who have been examined, the law of *Scotland* binds Mr. *Dalrymple*, though a minor, a soldier, and a foreigner, as effectively as it would do, if he had been an adult, living in a civil capacity, and with an established domicil in that country.

The marriage, which is pleaded to be constituted, by virtue of some or all of the facts, of which I have just given the outline, and to which I shall have occasion more particularly to advert in the course of my judgment, has been in the argument described as a *clandestine* and *irregular* marriage. It is certainly a *private* transaction between the individuals, but it does not of course follow that it is to be considered as a *clandestine* transaction, in any ignominious meaning of the word; for it may be, that the law of the country, in which the transaction took place, may contemplate private marriages, with as much countenance, and favour, as it does the most public. It depends likewise entirely upon the law of the country, whether it is justly to be stiled an *irregular* marriage. In some countries one only form of contracting marriage is acknowledged, as in our own, with the exception of

of particular indulgences to persons of certain religious persuasions; saving those exceptions, all marriages not celebrated according to the prescribed form, are mere nullities; there is and can be no such thing in this country as an irregular marriage. In some other countries, all modes of exchanging consent being equally legal, all marriages are on that account equally regular. In other countries, a form is recommended and sanctioned, but with a toleration and acknowledgment of other more private modes of effecting the same purpose, though under some discountenance of the law, on account of the non-conformity to the order that is established. What is the law of *Scotland* upon this point?

Marriage, being a contract, is of course *consensual* (as is much insisted on, I observe, by some of the learned advocates) for it is of the essence of all contracts, to be constituted by the consent of parties. *Consensus non concubitus facit matrimonium* *, the maxim of the Roman civil law, is, in truth, the maxim of all law upon the subject; for the *concubitus* may take place, for the mere gratification of present appetite, without a view to any thing further; but a marriage must be something

* D. lib. 50. tit. 17. l. 30. de Reg. Juris.—D. lib. 35. tit. 1. l. 15.—*Huber*, de Nuptiis, p. 23. lib. 24. tit. 2. de Divortiis.—*Voet.*, lib. 23. tit. 2. s. 2.—*Vinnius*, lib. 1. tit. 9. s. 1.—*Cujac.* in D. de Rit. Nup. v. 1. p. 800. in Cod. lib. 5. tit. 1. de Spons. et Arrhis.—*Taylor's* Civil Law, p. 301. *Puffendorf.* b. 6. c. 1. s. 14. —*Wood's* Instit. book 1. chap. 1.—27. qu. 2. c. 1. Matrimonium.—27. qu. 2. c. 2. Sufficiat.—27. qu. 2. c. 5. Cum initiatur. —27. qu. 2. c. 6. Conjuges.—C. 25. Extra. de Spons. et Matrim. —*Huber.*, Eunom. Rom. ad lib. 23. Pand. Vind. s. 1.—*Hoppii*, commen. ad Ins. lib. 1. tit. 10.—*Wood's* Instit. book 1. chap. 2. *Ayl.* Parerg. 362.

more;

more; it must be an agreement of the parties looking to the *consortium vitæ**: an agreement indeed of parties capable of the *concubitus*, for though the *concubitus* itself will not constitute marriage, yet it is so far one of the essential duties, for which the parties stipulate, that the incapacity of either party to satisfy that duty nullifies the contract†.—Marriage, in its origin, is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind: It is the parent, not the child, of civil society, "*Principium urbis et quasi seminarium Reipublicæ*‡."—In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civilized countries, acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded: It then becomes a religious, as well as a natural, and civil contract; for it is a great mistake to suppose that, because it is the one, therefore it may not likewise be the other. Heaven itself is made a party to the contract, and the consent of the individuals, pledged to each other, is ratified and consecrated by a vow to God. It was natural enough that such a contract should, under the religious system which prevailed in *Europe*, fall under ecclesiastical notice and cognizance, with respect both to its theological and its legal constitution; though it is not

* D. lib. 23. tit. 2. l. 1.—Instit. lib. 1. tit. 9. s. 1.

† C. 2 et 3. Extra. de Spons. et Matrim.—*Vinnius*, lib. 1. tit. 9. s. 1.—*Burn*'s Eccles. Law, v. 2. p. 500. *Ayl.* Par. 226.

‡ *Cic.* de Off. l. 17.

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unworthy of remark that, amidst the manifold ritual provisions, made by the Divine Lawgiver of the Jews for various offices and transactions of life, there is no ceremony prescribed for the celebration of marriage. In the Christian church marriage was elevated in a later age to the dignity of a sacrament, in consequence of its divine institution, and of some expressions of high and mysterious import respecting it contained in the sacred writings. The law of the Church, the canon law (a system which, in spite of its absurd pretensions to a higher origin, is in many of its provisions deeply enough founded in the wisdom of man,) although, in conformity to the prevailing theological opinion, It reverenced marriage as a sacrament, still so far respected its natural and civil origin, as to consider, that where the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest; It had even in that state the character of a sacrament*; for it is a misapprehension to suppose, that this intervention was required as matter of necessity, even for that purpose, before the Council of *Trent.* It appears from the histories of that council, as well as from many other authorities, that this was the state of the earlier law, till that council passed its decree for the reformation of marriage: The consent of two parties†

* *Sanchez,* lib. 2. disp. 6. s. 2. et lib. 2. disp. 10. s. 2.—Father *Paul,* p. 737.—*Pallavicini,* lib. 23. chap. 8.—*Pothier,* tit. 3. p. 290.—27. qu. 2. c. 10. omne.

† C. 25. et C. 31. Extra de Spons. et Matrim.—C. 3. Extra. de Sponsa Duorum.—*Swinburn,* sect. 4. s. 2, 3, 4. et sect. 18. s. 1.—*Brower,* lib. 1. cap. 2. s. 8, 9. et cap. 22. s. 12. et cap. 27. s. 21.

expressed

expressed in words of present mutual acceptance, constituted an actual and legal marriage, technically known by the name of *Sponsalia per verba de præsenti*, improperly enough, because *sponsalia*, in the original and classical meaning of the word, are preliminary ceremonials of marriage, and therefore, *Brower* justly observes, *jus pontificium nimis laxo significatu, imo etymologiâ invitâ ipsas nuptias sponsalia appellavit**.—The expression, however, was constantly used in succeeding times to signify *clandestine* marriages, that is, marriages unattended by the prescribed ecclesiastical solemnities, in opposition, first, to regular marriages; secondly, to mere engagements for a *future marriage*, which were termed *sponsalia per verba de futuro*, a distinction of *sponsalia* not at all known to the Roman civil law †. Different rules, relative to their respective effects in point of legal consequence, applied to these three cases—of regular marriages,—of irregular marriages,—and of mere promises or engagements. In the regular marriage every thing was presumed to be complete and consummated both in substance and in ceremony.—In the irregular marriage every thing was presumed to be complete and consummated in substance but not in ceremony; and the ‡ ceremony was enjoined to be undergone as matter of order.—In the promise or *sponsalia de futuro*, nothing was presumed to be complete or consummate either in substance or ceremony. Mutual § consent would release the parties from their engagement; and

* L. 1. c. 1. n. 6.

† *Swinburn*, Sect. 3. §. 3.

‡ *Swinburn*, Sect. 17. §. 1.

§ C. 2. Extra. de Spons. et Matrim.

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one party, without the consent of the other, might contract a valid marriage, regularly or irregularly, with another person; but if the parties who had exchanged the promise had carnal * intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection. I spare myself the trouble of citing from the text books of the Canon Law, the passages that support these assertions. Several of them have been cited in the course of this discussion, and they all lie open to obvious reference in *Brower* and *Swinburn*, and other books that profess to treat upon these subjects. The reason of these rules is manifest enough. In proceedings under the Canon Law, though it is usual to plead consummation, it is not necessary to prove it, because it is always to be presumed in parties not shewn to be disabled by original infirmity of body. In the case of a marriage *per verba de præsenti*, the parties there also deliberately accepted the relation of husband and wife, and consummation was presumed as naturally following the acceptance of that relation, unless controverted in like manner. But a promise *per verba de futuro* looked to a future time; the marriage which it contemplated might perhaps never take place. It was † defeasible in various ways;

* C. 30. et 31. Extra. de Spons. et Matrim. — C. 3. Extra. de Sponsa duorum. — *Brower*, lib. 1. cap. 22. — *Swinburn*, Sect. 17. s. 11.

† *Swinburn*, Sect. 18. p. 1. et Sect. 4. p. 2.

and,

and, therefore, consummation was not to be presumed; it must either have been proved or admitted. Till that was done, the relation of husband and wife was not contracted: it must be a * promise *cum copula* that implied a present acceptance, and created a valid contract founded upon it.

Such was the state of the Canon Law, the known basis of the matrimonial law of *Europe*. At the Reformation, this country disclaimed, amongst other opinions of the *Romish* Church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin; and on that account, as well as of the religious forms that were prescribed for its regular celebration, an *holy* estate, *holy matrimony*, but it likewise retained those rules of the Canon Law which had their foundation not in the sacrament, or in any religious view of the subject, but in the natural and civil contract of marriage. The Ecclesiastical Courts, therefore, which had the cognizance of matrimonial causes, enforced these rules, and amongst others, that rule which held an irregular marriage, constituted *per verba de præsenti, not followed by any consummation shewn*, valid to the full extent of voiding a subsequent regular marriage contracted with another person †. A statute ‡ passed in the reign of *Henry* VIII. proves the fact by reciting, that "Many persons after long continuance in matri-"mony, without any allegation of either of the "parties, or any other at their marriage, why the "same matrimony should not be good, just, and "lawful,

* *Swinburn*, Sect. 17. p. 11.

† *Brower*, 1. 22. 12.

‡ 32 *Hen* 8 cap. 38. sec. 2.

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" lawful, and after the same matrimony solemnized, " and *consummate by carnal knowledge*, have by an " unjust law of the Bishop of *Rome*, upon pretence " of a former contract made, and *not consummate* " *by carnal copulation*, been divorced and se- " parate," and then enacts, " that marriages " solemnized in the face of the Church, and con- " summate with bodily knowledge, shall be deemed " good, notwithstanding any pre-contract of ma- " trimony, *not consummate with bodily knowledge*, " which either or both the parties shall have " made." But this statute was afterwards repealed, as having produced *horrible mischiefs*, which are enumerated in very declamatory language, in the preamble of the statute 2 *Edw.* VI.; and *Swinburn*, speaking the prevailing opinion of his time, applauds the repeal, as *worthily and in good reason enacted*. The same doctrine is recognized, by the temporal Courts, as the existing rule of the matrimonial law of this country, in *Bunting*'s case, 4 *Coke*, 29.—" *John Bunting*, father of the " plaintiff, and *Agnes Adenshall*, contracted mar- " riage *per verba de præsenti*, and afterwards, on " the 10th of *Dec.* 1555, the said *Agnes* took to " husband *Thomas Twede*; and afterwards, on the " 9th of *July*, *Bunting* libelled against her in the " Court of Audience, *et decret. fuit quod prædict.* " *Agnes subiret matrimonium cum præfato Bunting*, " *et insuper pronunciatum fuit dictum matrimonium* " *fore nullum*." Though the common law certainly had scruples in applying the civil * rights of dower,

* *Swinburn*, Sect. 1. s. 2. and Sect. 17. s. 29.—Tract. de Repub. *Ang.* p. 103.—*Perkins*, tit. Feoffments, fol. 40. p. 38. Ed. 3. 12.—1 Roll. Abridg. 341. and 357.—*Moor*, 169.

and

and community of goods, and legitimacy in the cases of these looser species of marriage. In the later case of *Collins* and *Jesson*, 3 *Anne*, it was said by *Holt*, Chief Justice, and agreed to by the whole Bench, that "if a contract be *per verba de præsenti*, "it amounts to an actual marriage, which the very "parties themselves cannot dissolve by release or "other mutual agreement, for it is as much a mar-"riage in the sight of God, as if it had been in "*facie ecclesiæ*." "But a contract *per verba de* "*futuro*, which do not intimate an actual marriage, "but refer to a future act, is releasable." 2 *Salk.* 437. *Mod.* 155. In *Wigmore*'s case, 2 *Salk.* 438, the same judge said, "a contract *per verba de præ-*"*senti* is a marriage; so is a contract *de futuro*; "if the contract be executed, and he take her, 'tis "a marriage, and they cannot punish for fornica-"tion." In the Ecclesiastical Court the stream ran uniformly in that course. One of the most remarkable is that furnished by the diligence of Dr. *Swabey*, on account of its striking resemblance to the present case: I mean the case of Lord *Fitzmaurice*, son of the Earl of *Kerry*, *coram Deleg.* in 1732. There were in that case, as in the present, three engagements in writing: The first was dated *June* 23, 1724, and contained these words, "We swear we will marry one another." The second, dated *July* 11, 1724, was to this effect: "I take you for my wife, and swear never "to marry any other woman." This last contract was repeated in *December* of the same year. It was argued there, as here, that the iteration of the declaration proved that the parties did not depend upon their first declaration, and was in effect a disclaimer of it. But the Court, composed of a full

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full Commission, paid no regard to the objection, and found for the marriage, and an application for a commission of review, founded upon new matter alleged, was refused by the Chancellor. Things continued upon this footing till the Marriage Act, *26 G. 2. c. 33.* described by Mr. Justice *Blackstone** "an innovation on our laws and constitution," swept away the whole subject of irregular marriages, together with all the learning belonging to it, by establishing the necessity of resorting to a public and regular form, without which the relation of husband and wife could not be contracted.

It is not for me to attempt to trace the descent of the matrimonial law of *Scotland* since the time of the Reformation. The thing is in itself highly probable, and we have the authority of *Craig*† for asserting that the Canon Law is its basis there, as it is every where else in *Europe*, "*totam hanc questionem pendere a jure pontificio,*" though it is likely enough that in *Craig*'s time, who wrote not long after the Reformation, the consistorial law might be very *unsettled*, as Mr. *Cay* in his deposition describes it to have been. It is, however, admitted by that learned gentleman, that it settled upon its former foundations, for he expressly says, that *the Canon Law in these matters is a part of the law of the land; that the Courts and lawyers reverence the decretals, and other books of the more ancient Canon Law;* and I observe that in the depositions of most of the learned witnesses, and indeed in all the *factums* that I have seen upon these subjects, they are referred to as authorities. Several regu-

* Book 1. chap. 15. s. 3.

† *Craig*, lib. 2. dieg. 18. s. 17.

lations,

lations, both ecclesiastical and civil, canons and statutes, have prescribed modes of celebrating marriage. Mr. *Cathcart*, in particular, refers to them in his deposition. Some of these appear to have been made in times of great ferment, during the conflict between the Episcopal and Presbyterian parties, and are therefore, I presume, of transitory and questionable authority. Mr. *Cathcart* infers that the whole of the *Scotch* statutes hold solemnization by a clergyman, or, as he expresses it, some one assuming the functions of a clergyman, as *necessary*. It rather appears difficult to understand this consistently with the fact, that other marriages have *always* been held legal and valid. What the form of solemnization by a clergyman is, I have not been accurately informed; prescribed ritual forms are not, I believe, admitted by the church of *Scotland* for any office whatever. Whether the clergyman merely receives the declaration as a witness, or pronounces the parties, by virtue of his spiritual authority, to be man and wife, as in our form, does not distinctly appear. I observe that Mr. *Gillies* says in his deposition, "that to make marriage valid, it is not "necessary that it should be celebrated in *facie* "*ecclesiæ*, but *rebus integris* it can only be constituted by a consent adhibited in the presence of a "clergyman, or *in some mode equivalent to an actual* "*celebration*." So Lord *Braxfield* in a loose note, which is introduced, is made to say, "Private con-"sent is not the consent the law looks to; it must "be before a priest, or *something equivalent*." Now what are these equivalents? and how to be provided? Are they to be carved out by the private fancy and judgment of the individuals? If so,

though

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though equivalent, they can hardly be deemed the regular forms, and yet appear to stand on a footing of equal authority. I observe, likewise, that a marriage before a magistrate is alluded to in some passages, as nearly equal to that before a minister, though certainly not a marriage in *facie ecclesiæ*, in any proper sense of that expression.

Sir *Ilay Campbell* states, in an opinion of his given to the *English* Chancery * in a case furnished to me by Dr. *Stoddart*, "that marriages, irregularly "performed without the intervention of a clergy-"man, are censurable, and formerly the parties "were liable to be fined or rebuked in the face of "the church, *but this for a long time has not been "practised.*" The regulations, therefore, whatever they may be, are not penally enforced; and it does not appear, that they are enforced by any sense of reputation or of obligation imposed by general practice. The advocates, who describe the modes of marriage by the terms *regular* and *irregular*, seem, as far as I can collect, to attribute no very distinctive preference to the one over the other; at any rate the distinction between them is not very strongly marked in the existing usage of that country. Many of the marriages, which take place between persons in higher classes of society, are contracted in such *irregular* forms, if so to be denominated. They appear to create no scandal; to give no offence. The parties are not reprobated by public opinion, nor is legal censure actually applied. But taking it, that the distinction between the *regular* and *irregular* marriages was much stronger than I am enabled, by the pre-

* Lib. Reg. A. 1780. f. 552.

sent

sent evidence, to suppose, the question still remains to be examined, how far actual consummation is required, by the law of *Scotland*, in marriages which are so to be deemed *irregular*.

The libel is drawn in a form not calculated to extract, simply and directly, a distinct statement of what the law of *Scotland* may be upon this point; for it collects together all the points of which the party conceives she can avail herself, consummation included, as matters of fact and matters of law, and then alleges, that, by the law of *Scotland*, this aggregate constitutes a marriage; without providing for a possible case in which she might establish some of these matters and fail in establishing others, *e. g.* if she failed in proof of a *copula*, but succeeded in establishing a solemn compact. If the law had been more distinctly understood here at the commencement of this suit, the libel would probably have been drawn with more accommodation to the possible state of facts that might ultimately call for the proper specific rule of law. The advocates of *Scotland* have, to a great degree, supplied the want of that distinctness in the libel, by bringing forward the distinctions in their answers, and applying what they conceive to be the law, applicable to the possible case, that may result from the evidence; most of them have stated what they conceive to be the law, first, in the case of a promise *de futuro;* secondly, of a promise *cum copula;* thirdly, of a solemn declaration or acknowledgment of marriage; and fourthly, of such a declaration accompanied by a *copula*. It may be convenient to consider, first, whether the present case is a case of promise, or of present declaration and acknowledgment.

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ledgment. It will be convenient to do so in two respects: The first convenience attending it is, that the fact itself is determinable enough upon the face of written existing instruments. It is not to be gathered from the loose recollections of loose verbal declarations, not guarded either in the expressions of those who made them, or in the memory of those who attest them. The second convenience resulting from this is, that a large portion of the inquiry into the other points of the case may, in a great degree, be rendered superfluous; for if these papers contain mere promises, then have I to consider only the law of promises, as referable to cases accompanied or unaccompanied by a *copula*, leaving out entirely the law that respects acknowledgment and declaration. On the other hand, if they are to be considered as acknowledgments, then the law of promises may be dismissed, except perhaps sometimes to be introduced incidentally for purposes of occasional illustration.

Whether they are to be considered as promises or declarations must be determined upon the contents of the instruments themselves, on such a view as the plain meaning of the words imports, and upon the information of their technical meaning as communicated by the *Scotch* lawyers; for it is possible that they may be subject to a technical construction different from their obvious meaning. This is the case in the marriage settlements of *Scotland*. The words of the *stipulatio sponsalitia* are present declaratory words; the parties mutually accept each other, but the engagements they enter into are always technically considered to be mere promises *de futuro*. Those, who are conversant in the

the books of the Canon Law, will recollect the extremely nice distinctions which that law and its commentators have made between expressions of a very similar import in their obvious meaning, as constituting contracts *de præsenti*, or only promises *de futuro*.

The first paper is without date, and is merely a *promise*. Mr. *Dalrymple* promises to marry Miss *Gordon as soon as it is in his power*, and she promises the same; it is subscribed by both their names—is endorsed "A sacreed promise," and is left in her possession. It is pleaded to be the first that was executed by them, and it is highly reasonable to presume that it was so, for no person, I think, would be content to accept such a paper as this, after having received the papers which follow, marked 2, and 10. The paper marked No. 2. is dated on the 28th of *May* 1804, and contains these words, "I hereby *declare Johanna* "*Gordon* is my lawful wife; and I hereby *acknow-* "*ledge John William Henry Dalrymple* as my "lawful husband." I see no great difference between the expression *declare* and *acknowledge;* the words properly enough belong to the parties by whom they are respectively used, and are perhaps not improperly adapted to the decorums of such a transaction between the sexes. No. 10. is a reiterated declaration on the part of Mr. *Dalrymple*, accompanied with a promise "that he will "acknowledge Miss *Gordon* as his lawful wife the "moment he has it in his power." She makes no repeated declaration, but promises that "nothing "but the greatest necessity, (necessity which "———— situation alone can justify,) shall ever "force

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"force her to declare this marriage." It is signed by him, and by her, describing herself *J. Gordon, now J. Dalrymple*, and it is dated *July* 11, 1804. Both the papers are inclosed in an envelope, on which is inscribed "Sacreed promises "and engagements:" There *are* promises and engagements that would satisfy these terms, independent of the words which contain the declaration of the marriage. At the same time it is to be observed, that the words "promises and en-"gagements" are not improperly applied to the marriage vow itself, which is prospective in its duties, which engages for the performance of future offices between the parties till death shall part them, and to which, in the words of our liturgy, *it plights their troth*, or in more modern language, pledges their good faith for that future performance. I feel some hesitation in acceding to the remark that the paper marked No. 2. is at all weakened or thrown loose by the mere engagement of secrecy, which seems to be the principal, if not the sole object of the latter paper, though Mr. *Dalrymple* has thrown in a renewed declaration of his marriage; that reiterated declaration, though accompanied with a promise of secrecy, cannot, upon any view of the case, be considered as a disclaimer of the former. An engagement of secrecy is perfectly consistent with the most valid, and even with the most regular marriages. It frequently exists even in them from prudential reasons; from the same motives it almost always does in private or clandestine marriages. It is only an evidence against the existence of a marriage, when no such prudential reasons can be

assigned

assigned for it, and where every thing, arising from the very nature of marriage, calls for its publication.

Such is the nature of these exhibits; first, a promise; secondly, that promise merged in the direct acknowledgment of the accomplished fact; thirdly, a renewed admission of the fact on his side, with a mutual engagement for secrecy, till the proper time for disclosure should arrive.

In these papers, as set up by Miss *Gordon*, resides the *constitution*, as some of the gentlemen, who have been examined, call it, or as others of them term it, the *evidences* of the marriage; for it is matter of dispute between these learned persons, whether such papers, when free from all possible impeachment, are *constituents*, or merely *evidences* of marriage. It appears to be a distinction not very material in its effects; because if it is to be considered that such papers, so qualified, are only to be treated as *evidences*, yet if free from all possible impeachments, on the grounds on which the law allows them, as evidences to be impeached, they make full faith of the marriage, they sustain it as effectually, as if, according to other ideas, they directly constituted it; they have then become *præsumptiones juris et de jure*, which establish the same conclusion, although in another way.

But these papers must be taken in conjunction with the letters which may controul or confirm them.—What is the effect of the letters? In almost all of them Mr. *Dalrymple* addresses Miss *Gordon* as his wife, and describes himself as her husband. In the first letter he insists upon it, that she shall draw upon him for any money she may stand in need of, "for it is her right," and "in

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" in accepting of it she will prove her acknow-" ledgment of it." *Her* sister he calls *his* sister. This letter appears by the post-mark to have been written before No. 2, and therefore has been said to be entirely premature, and to give an interpretation to subsequent expressions of the like kind.—But, *non constat* that it might not be written long after the undated promise by which the parties entered into a solemn engagement to marry. Verbal declarations, similar in their imports to the contents of No. 2., might have passed, for it can hardly be conceived that such a paper could have passed, without many preliminary verbal declarations to the same effect. People do not write in that manner, till after they have talked together in the same style.—The post-mark on the letter, No. 4, is *May* the 30th, and this letter refers to what passed on the night after the paper, No. 2, bears date; in it, he says, " You are my wife, to " retract is impossible and ever shall be; I have " proved my legal right to protect you, which I " have most fully established: nothing in this " world shall break those ties." The letter, No. 5, has these expressions: " Remember you " are mine: that God Almighty may preserve my " wife is the prayer of her husband." No. 6. " It " grieves me to suffer you five minutes from your " husband; nothing can change my sentiments, " independent even of those sacred ties which " unite us.—Nothing ever can or should (if " 'twere possible) annul them.—Put that con-" fidence in me which your duty requires.—That " God may ever preserve my wife, and inspire her " with the purest love for her husband, is the first " wish of her adoring ———." No. 8. " I have " received

" received letters from town which say that Lord " *Stair* has heard of our marriage." No. 12. " Whatever money you may want draw on me " for without scruple." No. 13, dated *May* 29, 1805. " Situated as you are, nothing could strengthen the " ties which unite us, therefore wish it not to be " mentioned that you are my wife till it can be " done without injury to ourselves. I insist upon " a paper acknowledging yourself as my wife." No. 14, dated *June* 10, 1805. " Forward to me the " paper I requested in my last, and acknowledge " yourself my wife — that as we are not immortal " I may leave you, in trust of a friend, the small " remains of what was once a tolerable fortune; " you can't refuse on any legal grounds; do, my " dearest wife, forward it." In No. 15, dated *June* 28, 1805, he says, " I would not give up the " title of your sister's brother for any consi- " deration. Don't deny yourself what you require, " as I should not wish my wife to appear in any " thing not consistent with her rank; I will " arrange before my departure money-matters, so " as to give you every opportunity of gratifying " your taste, or any other fancy." In the letter marked 14, he asks her permission to go abroad on account of the distress of his affairs. " Will " you allow me to endeavour by a short absence " to rectify these things? In asking your consent, " I humbly conjure you, dearest love, to pardon " me.—I solemnly assure you I will not be absent " from you very long."—In another part of this letter he points out the period of four months as the probable duration of his absence.

Now it is impossible to say that the exhibits, No. 2 and 10, are at all weakened by the strong

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conjugal expressions contained in these letters.— Taken together they, in their plain and obvious meaning, import a recognition of an existing marriage. What is their technical meaning? That information we must obtain from the learned persons who have been examined.—Mr. *Erskine*, Mr. *Hamilton*, Mr. *Cragie*, Mr. *Hume*, and Mr. *Ramsay*, are all clearly of opinion that they are "*present* "*declarations.*"—Mr. *Cay* is equally clear that they "are contracts *de præsenti.*"—Sir *Ilay Campbell* describes them as "*very explicit mutual* "*declarations of marriage* between the parties."— Mr. *Clerk* says that No. 2. is evidence of a very high nature to prove that "a marriage *had been* "contracted by the parties; it is *a full and explicit* "*declaration* of a contract *de præsenti.*" "No. 10," he says, "imports little more than No. 2; it is "*important evidence* to the *same effect.*" Mr. *Cathcart* and Mr. *Gillies* who hold a *copula* in all cases necessary, do not distinctly say under which class of cases the present falls.

Upon this view I think myself entitled to lay aside, at least for the present, the rules of law that apply to promises. The main enquiry will thus be limited to two questions, whether, by the law of *Scotland*, a present declaration *constitutes* or *evidences* a marriage *without a copula;* and secondly, whether, if it does not, the present evidence supplies sufficient proof that such a requisite has been complied with.

The determination of the first question must be taken from the authorities of that country, deciding for myself and for the parties entrusted to my care, as well as I can, upon their preponderance where they disagree, and feeling that hesitation of judg-

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ment which ought to accompany any opinion of mine upon points, which divide the opinions of persons so much better instructed, in all the learning which applies to them.

The authorities to which I shall have occasion to refer are of three classes; first, the opinions of learned professors given in the present or similar cases; secondly, the opinions of eminent writers as delivered in books of great legal credit and weight; and thirdly, the certified adjudication of the tribunals of *Scotland* upon these subjects. I need not say that the last class stands highest in point of authority; where private opinions, whether in books or writing, incline on one side, and public decisions on the other, it will be the undoubted duty of the Court, which has to weigh them, *stare decisis.*

Before I enter upon this examination I will premise an observation, from which I deduce a rule that ought, in some degree, to conduct my judgment; the observation I mean, is this, that the Canon Law, as I before have described it to be, is the basis of the marriage law of *Scotland,* as it is of the marriage law of all *Europe.* And whether that law remains entire, or has been varied, I take it to be a safe conclusion, that, in all instances where it is not proved that the law of *Scotland* has resiled from it, the fair presumption is, that it continues the same. Shew the variation, and the Court must follow it; but if none is shewn, then must the Court lean upon the doctrine of the ancient general law; for I do not find that *Scotland* set out upon any original plan of deserting the ancient matrimonial law of *Europe,* and of forming an entire new code upon principles hitherto un-

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known in the Christian world. It becomes of importance, therefore, to consider what is the ancient general law upon this subject, and, on this point, it is not necessary for me to restate, that by the ancient general law of *Europe*, a contract *per verba de præsenti*, or a promise *per verba de futuro cum copulâ*, constituted a valid marriage without the intervention of a priest, till the time of the Council of *Trent*, the decrees of which Council were never received as of authority in *Scotland*.

It appears from the case of *Younger*, cited by Sir *Thomas Craig* *, that, in his time, the practice upon a contract *de præsenti*, was the same in *Scotland* as it continued to be in *England* till the period of the Marriage Act, viz. to compel the reluctant party to a public celebration as matter of order. This was soon discontinued in *Scotland*, on account of the apparent incongruity of compelling a man to marry against his will, but with a solemn profession of love and affection to the party who compelled him. But though they discarded the process of compulsion for some such reason as this, which is stated by Mr. *Hume*, they might still consistently retain the principle, that a present consent constituted a valid marriage. Whether it was retained, is the question I have to examine, assuming first (as I have done) that if the contrary is not shewn, it must so be presumed.

The evidence of opinions on this point, taken in this and similar cases, and under similar authority, stands thus: — Mr. *Erskine*, Mr. *Cragie*, Mr. *Hamilton*, Mr. *Hume*, and Mr. *Ramsay*, who

* Lib. 2. dieg. 18. s. 19.

have

have been examined upon the question at present before the Court, are all clear and decided in their opinions, that a declaration *per verba de præsenti* without a *copula* does, by the law of *Scotland,* constitute a valid marriage. I will not enter into an examination of their authorities where they agree — *Oportet discentem credere,* though, where authorities differ, it is a rule which cannot be universally applied. Still less shall I presume to discuss their reasonings, except in a few instances, where, however desirous to follow, I find a real inability to accompany them to their conclusions. To the authorities above stated, I must add the opinions of the learned persons examined upon the case of *Beamish* and *Beamish;* a case which came before this Court upon a similar question of a *Scotch* marriage of an *Englishman* with a *Scotch* woman in the year 1788, and in which the Court of Arches to which it was appealed, upon the informations of law obtained from the learned advocates of *Scotland,* pronounced for the validity of the marriage. Mr. *John Millar,* Professor of law at *Glasgow,* there said, " that, by " the law of *Scotland,* the ceremony of being " married by a clergyman was not necessary to " constitute a valid marriage. The deliberate " consent of parties, entering into an agreement " to take one another for husband and wife, was " sufficient to constitute a legal marriage, as valid " in every respect as that which is celebrated in " the presence of a clergyman.—Consent must " be expressed or understood to be given *per* " *verba de præsenti;* for consent *de futuro,* that " is, a promise of marriage, does not constitute " actual marriage. By the *Scotch* law, the delibe-

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" rate consent of parties constitutes marriage."— Mr. *John Orr*, in his deposition, said "By the laws " of *Scotland*, a solemn acknowledgment of a mar- " riage having happened between the parties, " whether verbally, or in writing, is sufficient to " constitute a marriage, whether expressed in " *verbis de præsenti*, or in an acknowledgment that " the marriage took place at a former period. A " promise followed by a *copula* would constitute a " valid marriage; and a written instrument con- " taining not a consent *de præsenti*, but only " stating that the parties were married at a certain " time, or even a solemn verbal acknowledgment " to this effect, although no actual marriage had " taken place, is sufficient to constitute a marriage " by the law of *Scotland*."—Mr. *Hume* said, " Marriage is constituted by consent of parties " to take or stand to each other in the relation of " husband and wife.—The mode or form of " consent is not material, but it must be *de* " *præsenti*." Mr. *Erskine* and Mr. *Robertson* agreed in saying, " that a deliberate acknowledg- " ment of the parties that they were married, " though not containing a contract *per verba de* " *præsenti*, is sufficient evidence of a marriage, " without the necessity of proving the actual " celebration." Mr. *Clerk*, Mr. *Gillies*, and Mr. *Cathcart*, who are examined in the present case on the part of Mr. *Dalrymple*, are equally clear in their opinions on the other side of the question. Mr. *Cay* inclines to think a *copula* necessary, " although well aware that a different opinion " prevails among lawyers on this point."

Sir *Ilay Campbell*'s opinion upon this important point, which the Court was particularly eager to learn,

learn, is, through some inaccuracy of the examiner, transmitted in such a manner as to leave it rather a matter of question, which of the two opinions he favours; for in the former part of the deposition he is made to say, that "by the general principles "of the law of *Scotland*, marriage is *perfected* by "the mutual consent of parties accepting each "other as husband and wife." In words so express and unqualified, pointing to nothing beyond the mutual acceptance of the parties, as *perfecting* a marriage without reference to any future act as necessary to be done, I thought I had received a judgment of high authority in favour of the ancient rule, that consent without a *concubitus* constitutes a marriage: but in a latter part of the deposition, he lays it down, that this acknowledgment *per verba de præsenti* must be attended with personal intercourse, prior or subsequent; if so, it throws a doubt upon the precise meaning of the former position, which had declared a marriage perfected by mere mutual acceptance. "Without "such intercourse," Sir *Ilay Campbell* says, "they "would resolve into mere *stipulatio sponsalitia*, "where the words are *de præsenti*, but the effect "future."—And here I have to lament the difficulty I find in following so highly respectable a guide to the conclusion, on account of a distinction that strongly impresses itself upon my apprehension. In the *stipulatio sponsalitia* the words *de præsenti* are qualified by the future words that follow, and which imply something more is to be done—a public marriage to take place; but in the case supposed of a clear present declaration, no such qualifying expressions occur—nothing pointing to future acts as the fulfilment of a

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present engagement. I find the greater difficulty in ascertaining the decided judgment of this very eminent person, from considering an opinion of his given into the *English* Court of Chancery*, upon a requisition from that Court, and on which that Court acted in the case of the *Scotch* marriage. In that case, the case of the marriage of *Thomas Thomasson*, and *Catharine Grierson*, the opinion dated *August* 18th 1781, and remaining on record in Chancery, states a present contract to be sufficient to validate a marriage, without any mention of a *copula*, antecedent, or subsequent; the known accuracy of his judgment would never have allowed him to omit this, if it had been considered by him at that time a necessary ingredient in the validity.—I might, perhaps, without much impropriety, be permitted to add another legal opinion of equal authority—the opinion of a person, whose death is justly lamented as one of the greatest misfortunes that have recently visited that country.—I need not mention the name of the Lord President *Blair*, upon whose deliberate advice and judgment this present suit has been asserted in argument, and without contradiction, to have been brought into this Court.

Upon this state of opinions, what is the duty of the Court? How am I to decide between conflicting authorities? For to decide I am bound.—Far removed from me be the presumption of weighing their comparative credit; it is not for me to construct a scale of personal weight amongst living authorities, with most of whom I

* Lib. Reg. A. 1780. F. 552.

am

am acquainted no otherwise than by the degree of eminence which situation, and office, and public practice, and reputation, may have conferred upon them.—In such a case I am under the necessity of quitting the proper legal rule of estimating *pondere, non numero;* I am compelled to attend a little to the numerical majority (though I admit this to be a sort of *rusticum judicium*), and finding that much the greater number of learned persons recognize a rule consonant to that which, in ancient times, governed the subject universally, I think I am not qualified to say, that as far as the weight of opinion goes, it is proved that the law of *Scotland* has innovated upon the ancient general rule of the marriage law of *Europe*. It appears to me, that the common mode of expression used in *Scotland*, which is constantly recurring, is no insignificant proof of the contrary doctrine. It is always expressed—Promise *cum copulâ*, the *copula* is in the ordinary phrase, a constant adjunct to the promise,—never to the *contract de præsenti*, strongly marking the known distinction between the two cases, that the latter by itself worked its own effect, and that the other would be of no avail, unless accompanied with its constant and express associate.

I come now to the text authorities of the *Scotch* writers:—the first to whom I shall refer is * *Craig*. It does not appear to me, that he is of great authority either one way or the other: he admits generally that the question of marriage is not *hujus instituti propria, sed judicis ecclesiastici,* and the case

* *Cragii* jus feudale, lib. 2. dieg. 18. § 17 & 19.

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of *Younger*, which he cites from the Court of the Commissaries, is a case not of a declaration *de præsenti*, but of a promise *cum copulâ;* unless, therefore, it is previously established, that a promise *cum copulâ* converts itself in all respects, and in all its bearings, into a contract *de præsenti* without a *copula*, (which certainly it does in the Canon Law, and is so recognized in the majority of the opinions upon the law of *Scotland*), it is no direct authority; and the conclusion is still more weakened, by observing, that, in that case, a judicial sentence of the Commissaries had been actually obtained, and that the point determined by the common law was a mere question of succession upon legitimation, which may depend upon many considerations extrinsic to the original validity of the marriage.

A more pertinent authority, and of higher consideration, is Lord *Stair*, an ancestor, I presume, of one of the present parties — a person whose learned labours have at all times engaged the reverence of *Scotch* jurisprudence. He treats of this very question, stating it as a *question*, and determines it thus: * "It is not every consent to the married "state that makes matrimony, but consent *de præ-* "*senti*, not a promise *de futuro matrimonio*." The marriage consists not in "the promise but in the "present consent, whereby they accept each other "as husband and wife, whether by words expressly, "or tacitly by marital cohabitation, or acknow- "ledgment, or by natural commixtion where there "hath been a promise preceding, for therein is "presumed a conjugal consent *de præsenti*, but

* *Stair*'s Institut. lib. 1. tit. 4. § 6.

"the

"the consent must specially relate to that conjunc-
"tion of bodies as being then in the consenter's
"capacity, otherwise it is void." I shall decline
entering into the distinctions and refinements
which have attempted to convert the obviously
plain meaning of this passage into one of a very
different import. It does appear to me to establish
the opinion of this very learned person to be, that
without a commixtion of bodies immediately fol-
lowing, (though in all cases to be looked to as pos-
sible, and at some time or other to take place,) a
present valid marriage is constituted by a contract
de præsenti.

Sir *George Mackinsie* *, Lord Advocate under
King *Charles* and *James* the Second, whose autho-
rity carries with it a fair proportion of weight,
says "Consent *de præsenti* is that in which mar-
"riage doth consist. Consent *de futuro* is a pro-
"mise; this is not marriage, for either party may
"*Resile rebus integris;*" manifestly intimating that
this could not be done under the consent *de præ-
senti.*

Another authority of more modern date, but
entitled to the greatest respect, is Mr. *Erskine*, a
writer of institutional law; by him it is expressly
laid down † that "marriage consists in the present
"consent, whether that be by words expressly, or
"tacitly, by marital cohabitation, or by acknow-
"ledgment. Marriage may without doubt be *per-
"fected* by the consent of parties declared by
"writing, provided the writing be so conceived as
"to import a present consent." Nothing upon
the direct meaning of these words can be more

* *Mackinsie.* Institut. book 1. tit. 6. § 3.
† B. 1. tit. 6. § 5.

clear,

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clear, than that he held bodily conjunction not necessary in a present contract. The very note of the anonymous editor, to whom, as an anonymous editor, no authority can be allowed, whatever may be the weight that really belongs to it, admits this; for he says, "From the later decisions of the Court, there is reason to doubt, if it "can *now* be held as law, that the private declara-"tions of parties, even in writing, are *per se* equi-"valent to actual celebration of marriage;" admitting, by that mode of expression, that such was the doctrine of the text and of the times when it was composed. M... *Clerk* says, "*he con-*"*siders the doctrine to be incorrect,*" thereby likewise admitting it to be the doctrine contained in these words.

I am not enabled to say how far Mr. *Hutcheson's* book can be considered as a work of authority. It, however, carries with it most respectable credentials, if it be true, what has been asserted in the argument, that it has been sanctioned by the approbation of several of the Judges of *Scotland*, and particularly of Sir *Ilay Campbell*, who refers to it in his deposition as a book of credit, and under whose patronage it is published, and to whose perusal it is said to have been submitted previously to its publication. His statement of the law of *Scotland* is full and explicit in favour of the doctrine, that private mutual declarations require no bodily consummation to constitute a marriage. He says that the ancient principle to this effect has been *happily* retained in the law of *Scotland*, speaking with similar feelings of attachment to it, which are observable in our *Swinburn*, when he talks of the Repealing Statute of *Edward* VI. as *being worthily*

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and for good reasons enacted, though a regard to domestic security has induced us to extinguish it entirely in this part of the island by the legislative provisions of later times. Mr. *Hutcheson* mentions it as a fact, that in the case of *M'Adam* against *Walker, none of the judges, who dissented from the judgment, disputed that doctrine of the law.* His testimony to such a fact is equivalent to that of any person of unimpeached credit — even to that of Lord *Stair* or Mr. *Erskine;* he has asserted it in the face of his profession and the public, and at the hazard of being contradicted, if he has stated it untruly, by the united voice of the whole bench and bar of his country.

In support of the opposite opinion, no ancient writer of authority has been cited. The only writer named, is of very modern date, Lord *Kaimes*, a man of an ingenious and inquisitive turn of mind, and of elegant attainments, but whose disposition, as he admits, did not lead him to err on the side of excessive deference to authority and establishment. The very title of his book is sufficient to excite caution; "*Elucidations respecting the law of Scotland*" may seem to imply rather proposed improvements than expositions of the existing law. He says, in his preface, that "he brings into the work the "sceptical spirit, wishing and hoping to ex-"cite it in others, and confesses that he had "perhaps indulged it too much." But supposing that it is liable to no objection of this kind, the whole of his chapter on these subjects, so far as this question is concerned, relates entirely to the effect of a promise *de futuro cum copulâ,* which has no application to the present case, unless it is assumed, that this amounts to the same thing identically in law,

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law, to all intents and purposes, as a contract *de præsenti.* I must add that his extreme inaccuracy, in what he ventures to state with respect both to the ancient Canon Law and to the modern *English* Law, tends not a little to shake the credit of his representations of all law whatever. In this chapter * he asserts that by the *present* law of *England*, a mutual promise of marriage *de futuro* is a good foundation to compel a refractory party to complete the marriage, by process in the Spiritual Court. I mean no disrepect to the memory of that ingenious person, when I say, that it is an extraordinary fact that it should have been a secret to any man of legal education in any part of this island, that the law of *England* has been directly the reverse for more than half a century.

No other reference to any known writer of eminence is produced; it is easy, therefore, to strike the balance upon this class of authorities; they are all in one scale, a very ponderous mass on one side, and totally unresisted on the other.

I come, thirdly, to the last and highest class of authorities, that of cases decided in the *Scotch* tribunals.— Many of these have been alluded to in the learned expositions which have been quoted, but such of them (and they are not few in number) as apply to the cases of promises *de futuro cum copulâ* I dismiss for the present, observing only, that if a promise of this kind be equivalent to a contract *de præsenti nudis finibus*, the result of those cases appears to me strongly to incline to the conclusion deduced from the two former classes of authority.

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* Page 32.

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With regard to decided cases, I must observe generally, that very few are to be found, in any administration of law in any country, upon acknowledged and settled rules. Such rules are not controverted by litigation, they are therefore not evidenced by direct decision: they are found in the maxims and rules of books of text-law. It would be difficult, for instance, to find an *English* case in which it was directly decided, that the heir takes the real, and the executor the personal estate; yet though nothing can be more certain, it is only incidentally, and *obiter*, that such a matter can force itself upon any recorded observation of a Court; equally difficult would it be to find a litigated case in the Canon Law, establishing the doctrine, that a contract *per verba de præsenti* is a present marriage, though none is more deeply radicated in that law.

The case of *Cochrane* versus *Edmonston*, before the Court of Session in the year 1804, was a case of contract *de præsenti*, and of this I shall take the account given by Mr. *Clerk*. The Court there held, "that a written acknowledgment *de præsenti* was "sufficient to constitute a marriage. The interlo-"cutor of the Lord Ordinary, which the Court ad-"hered to, rests upon the consent of parties to "constitute a marriage *de præsenti* without refer-"ring to the *copula*." Mr. *Clerk* says, "he can-"not suppose the Court overlooked the very ma-"terial circumstance of the *copula*," which did exist in that case, and which he says "would have "been sufficient with a bare promise to bind the "man to marriage."—I find great difficulty in acceding to this observation, particularly when it is stated that the Court adhered to the interlocutor, which

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which expressed the directly contrary doctrine, and even if it had not so done, it appears to me to be an inaccuracy too striking to attribute to that Court, that they should have declared consent *de præsenti* sufficient, without express mention of the *copula*, if they had thought it a necessary ingredient in the validity of the marriage. What Mr. *Clerk* says of his disposition to advise an appeal, in particular cases, is not necessary to be noticed in the present consideration, which regards only actual decisions, and not private opinions, however respectable. He admits expressly, that on the evidence of the report, he thinks it at least highly probable, that some such doctrine, as that held by Mr. *Erskine*, was laid down in that case by the Judges.

The next case which I shall mention is that of *Taylor* and *Kello*, which occurred in 1786. This was an action of declarator of marriage instituted by *Patrick Taylor* against *Agnes Kello*, and was grounded on a written acknowledgment in the following words: "I hereby declare you, *Patrick* "*Taylor*, in *Birkenshaw*, my just and lawful hus-"band, and remain your affectionate wife, *Agnes* "*Kello*." *Kello* delivered this written declaration to *Taylor*, and received from him another *mutatis mutandis* in the same terms, which she afterwards destroyed. There was no sufficient evidence to support the *concubitus*, but the Report states, that *the Court, in its decision, held this to be out of the question.* The Commissaries "found the mutual "obligations relevant to infer marriage between "the parties, and found them married persons "accordingly." This sentence was affirmed by the Court of Session, though that Court was

much

much divided upon the occasion, some of the Judges considering the declaration as merely intended to signify a willingness to enter into a regular marriage; but a majority of the Court thought, in conformity to the judgment of the Commissaries, that the marriage was sufficiently established. This sentence was reversed by the House of Lords, but upon the express grounds that neither of the parties understood the papers respectively signed by them to contain a final agreement to consider themselves as married persons; on the contrary it was agreed that the writing was to be delivered up whenever it was demanded: The whole subsequent conduct of the parties proving this sort of agreement.

It appears then that this was not considered by the House of Lords an *irrevocable* contract, such as that of marriage is in its own nature, from which the parties cannot resile even by joint consent, much less on the demand of one party only. This case, I think, goes strongly to affirm the doctrine, that an *irrevocable contract de præsenti* does of itself constitute a legally valid marriage. Mr. *Cathcart* admits, in his deposition, that this sentence of the Commissaries, confirmed by the Court of Session, would have been a decision in favour of the doctrine, that a contract *de præsenti* constitutes a marriage, if it had not been reversed by the House of Lords. But as it was clearly reversed upon other grounds, the authority of the two Courts stands entire in favour of the doctrine. Mr. *Gillies* thinks the reversal hostile to the doctrine, but he has not favoured the Court with the grounds on which he entertains this opinion. Mr. *Clerk* contents himself with saying, that the doctrine is not recognized: most assuredly

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assuredly it is not disclaimed; on the contrary, the presumption is, that if the contract had been considered *irrevocable*, the House of Lords would have attributed to it a very different effect.

In the case of *Inglis* against *Robertson*, which was decided in the same year, the Commissaries sustained a marriage upon a contract *de præsenti*, and this sentence was affirmed by the Court of Session upon appeal, and afterwards by the House of Lords. The accounts vary with respect to the proof of *concubitus* in this case, which renders it doubtful whether the decision was grounded on the acknowledgment only, or referred likewise to the *copula*. If it had no such reference, then it is a case directly in point: but if it had, it certainly cannot be insisted upon as authority upon the present question.

The case of *Ritchie* and *Wallace*, which was before the Court of Session in 1792, is not reported in any of the books, but is quoted by Mr. *Hamilton*, who was of counsel in the cause. It was the case of *a written declaration of an existing marriage, but accompanied with a promise that it should be celebrated in the church at some future and convenient time.* This very circumstance of a provision for a future public celebration might of itself have raised the question, in the minds of some Judges, whether these acknowledgments could be considered as relating to a matrimonial contract already formed and perfected in the contemplation of the parties themselves; and this is sufficient to account for the diversity of the opinion of the Judges upon the case, without resorting to any supposed difference of opinion on the general principle of law now controverted. The woman was pregnant

pregnant by the man when she received this written declaration from him, but, as I understand the case, nothing rested in judgment upon this fact; for Mr. *Hamilton* says, the woman *founded on the written acknowledgment* as a *declaration de præsenti* constituting a marriage, which conclusion of law was controverted by the man; but the Court, by a majority of six Judges to three, found the *acknowledgment libelled, relevant to infer the marriage.*

The case of *M'Adam* against *Walker* (13th of *November* 1806), which underwent very full discussion, is by all parties admitted to be a direct decision upon the point, though it was certainly attended with some difference of opinion amongst the Judges by whom it was decided. In that case *Elizabeth Walker* had cohabited with Mr. *M'Adam*, and borne him two daughters. In the presence of several of his servants, whom he had called into the room for the purpose of witnessing the transaction, he desired *Elizabeth Walker* to stand up and give him her hand; and she having done so, he said, "This is my lawful wife, and these my lawful "children." On the same day, without having been alone with *Walker* during the interval, he put a period to his existence. The Court held the children to be legitimate. It appears clearly that, in this case, there had been a *copula* antecedent, though none could have taken place subsequent to the declaration: It could not therefore have been upon the ground of want of *copula* that Sir *Ilay Campbell*, who holds a prior *copula* as good as a subsequent one, joined the minority in resisting that judgment. It is stated by Mr. *Hutcheson*, as a matter of fact, that "none of the Judges dis-

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"puted the law," but there were other grounds of dissent arising out of the circumstances of the case, unconnected with the legal question. "The "Judges entertained doubts of the sanity of "Mr. *M^c^Adam* at the time of the marriage; "they considered also, that when he made the "declaration he had formed the resolution of "suicide, and therefore did not mean to live with "the woman as his wife." It is said that this decision of the Court of Session is appealed from, and therefore cannot be held conclusive upon the point. At any rate it expresses the judgment of that Court upon the principle, and the appeal, whatever the ground of it may be, does not shake the respect which I owe to that authority whilst it exists unshaken.

I might here call in aid the numerous cases where promise *cum copulâ* has been admitted to constitute a marriage, if the rule of the Canon Law, transfused into the law of *Scotland*, be sound, that *copula* converts a promise *de futuro* into a contract *de præsenti*. If it does not, if *copula* is required in a contract *de præsenti*, what intelligible difference is there between the two—between a promise *de futuro* and a contract *de præsenti?*—None whatever. They stand exactly upon the same footing.—A proposition, I will venture to say, never heard of in the world, except where positive regulation has so placed them, till these recent controversies respecting the state of the marriage law of *Scotland*.

I might also advert to the marriages at *Gretna Green*, where the blacksmith supplies the place of the priest or the magistrate. The validity of these marriages has been affirmed in *England* upon the certificates

certificates of *Scotch* law, without reference to any act of consummation, for such I think was clearly the exposition of the law as contained in the opinion of Sir *Ilay Campbell*, upon which the *English* Court of Chancery founded its decision in the case of *Grierson* and *Grierson*.

What are the cases which have been produced in contradiction to this doctrine? — As far as I can judge, none, — except cases similar to those which have been already stated, where the superior Court has overruled the decisions of the Court below, and pronounced against the marriage, upon grounds which leave the principle perfectly untouched. — The case of *M·Lauchlan* contra *Dobson*, in *December* 1796, was a case of contract *per verba de præsenti* where there was no *copula*, in which the Commissaries declared for the validity of the marriage, and the interlocutor was altered by the Court of Session. But upon what grounds was that sentence reversed? Mr. *Hutcheson* states, that "the Court did not think there was sufficient "evidence of a real *de præsenti* matrimonial consent." Mr. *Hume* says, "the conduct of the "parties had been variable and contradictory;" and Sir *Ilay Campbell* says, "there were circum-"stances tending to shew that the parties did not "truly mean to live together." The dicta of Lord Justice Clerk *M^cQueen* have been quoted and much relied upon; but I must observe, that they come before the Court in a way that does not entitle them to much judicial weight: they are stated by Mr. *Clerk* to be found in notes of the handwriting of Mr. *Henry Erskine*, who is not himself examined for the purpose of authenticating them, although interrogatories are addressed to other

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persons with respect to other legal authorities, for which they are much less answerable. They are taken very briefly, without any context, nor is it stated in what manner, whether in the form of discussion or decision, they fell from that learned Judge. He is, however, made to say, "The case of "*M**cLauchlan* against *Dobson* is new, but the law "is old and settled. Two facts admitted *hinc inde*, "no celebration, no *concubitus*, nor promise of "marriage followed by *copula;* contract as to "land not binding till regularly executed, unless "where *res non sunt integræ*." This proposition that, "contract as to land not binding till regu-"larly executed," proves little, because it may refer to rules that are confined to agreements respecting that species of property, and even with regard to that species of property the contract may be sufficiently executed by the signing of articles or deeds, though there is no entry upon the land. "A promise without *copula locus pœnitentiæ*—even "verbal consent *de præsenti* admits *pœnitentia*," —that is the matter to be proved. "Form of con-"tracts contains express obligation to celebrate; "till that done either party may resile."—The reason is that these same forms contain words which qualify the present engagement by giving them a mere promissory effect. "Private consent "is not the *consensus* the law looks to. It must "be before a priest or *something equivalent;* they "must take the oath of God to each other;" this may be done in private to each other, as it actually was done in the case of Lord *Fitzmaurice:* "a pre-"sent consent not followed by any thing may be "mutually given up, but if so, it cannot be a mar-"riage." To be sure if the propositions contained

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in these dicta are correct, if it be true that a contract *de præsenti* may be mutually given up, then certainly it cannot constitute a marriage; but that is the very question which is now to be determined upon the comparative weight of authorities; I admit the authority of Lord *Braxfield*, deliberately and directly applied to any proposition to which his mind was addressed, to be entitled to the highest respect; but I have already adverted to the loose manner in which these dicta are attributable to him, and it is certainly a pretty strong circumstance against giving full effect to these dicta so introduced, without context and without authentication, that Lord *Braxfield*, as Lord Ordinary, refused the Bill of Advocation in the case of *Taylor* and *Kello* complaining of the sentence of the Consistorial Court, which found "mutual obli-" gations relevant to infer a marriage."

The other case that has been mentioned, is that of *M^cInnes* against *More*, which came before the House of Lords upon appeal in the year 1782. The facts therein were, that the man, at the woman's desire, had signed the acknowledgment not for the purpose of making a marriage, but merely as a colour to serve another and different purpose mutually concerted between them, namely, that of preventing the disgrace arising from the pregnancy of the woman. The Commissaries and the Court of Session had found the facts relevant to infer a marriage, but the House of Lords, considering the transaction as a mere blind upon the world, and that no alteration of the *status personarum* was ever intended by the parties themselves, reversed the sentence, and pronounced against the marriage.

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I am not aware of any other decided cases which have been produced against the proposition, that a contract *de præsenti* (be it in the way of *declaration* or *acknowledgment*) *constitutes*, or, if you will, *evidences* a marriage. It strikes me, upon viewing these cases, that such of them as are decided in the affirmative, have been adjudged directly upon this *principle*, and that where they have been otherwise determined, it turns out that they have rested upon *specialties*, upon circumstances which take them out of the common principle, and produce a determination that they do not come within it. If they do not go directly to the extent of affirming the principle, they at least imply a recognition of it, a sort of tacit assent and submission to its authority, an acknowledgment of its being so deeply intrenched in the law, as not to be assailable in any general and direct mode of attack. The exceptions prove the rule to a certain degree. It was proved in all those cases where there was a judgment apparently contradictory, that in truth they were not real matrimonial contracts *de præsenti.* The effect was not attributed to them, because they were not considered as such contracts. I cannot but think, that when case upon case came before the House of Lords, in which that principle was constantly brought before their eyes, they would have reprobated it as vicious if they had deemed it so, instead of resorting to circumstances to prove that the principle could not be applied to them. I may, without impropriety, add, that the Lord Chancellors of *England* have always, as I am credibly informed, in stating their understanding of *Scotch* law upon such subjects to the House of Lords, particularly Lord *Thurlow*,

Thurlow, been anxious to hold out that law to be strictly conformable to the canonical principles, and have scrupulously guarded the expressions of the public judgments of the House, against the possible imputation of admitting any contrary doctrine.

Upon the whole view of the evidence applying to this point, looking first to the rule of the general matrimonial law of *Europe*, — to the principle which I venture to assume, that such continues to be the rule of *Scotch* matrimonial law, where it is not shewn that that law has actually resiled from it, — to the opinions of eminent professors of that law, — to the authority of text writers, and to the still higher authority of decided cases (even without calling in aid all those cases which apply a similar rule to a promise *cum copulâ*) I think that being compelled to pronounce a judgment upon this point, I am bound to say, that I entertain as confident an opinion as it becomes me to do, that the rule of the law of *Scotland* remains unshaken; that the contract *de præsenti* does not require consummation in order to become "very "matrimony;" that it does, *ipso facto, et ipso jure*, constitute the relation of man and wife. There are learned and ingenious persons in that country, who appear to think this rule too lax, and to wish to bring it somewhat nearer to the rule which *England* has adopted; but on the best judgment which I can form upon the subject, it is an attempt against the general stream of the law, which seems to run in a direction totally different, and is not to be diverted from its course by efforts so applied. If it be fit that the law of *Scotland* should receive an alteration, of which that country itself is the

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best judge, it is fit that it should receive that alteration in a different mode than that of mere interpretation.

When I speak of a contract, I mean of course one that is attended with such qualifications as the law of *Scotland* requires for such a contract, and which in truth appear to me to be very little more than what all law requires for all contracts of every description, and without which an apparent contract upon any subject is, in truth, no contract at all; for having been led, by the manner in which these qualifications are sometimes described, to suppose at first, that they were of a *peculiar and characteristic* nature, I really cannot, upon consideration, discover in them any thing more than the *ordinary* qualifications requisite in all contracts. It is said that the marriage contract must *not be extorted by force or fraud.* Is it not the general law of contracts, that they are vitiated by proof of either? In the present case, *menace* and *terror* are pleaded in Mr. *Dalrymple*'s allegation as to the execution of the first *contract* No. 2, for as to the *promise* No. 1, he admits that it was given *merely at the entreaties and instigation of the lady*, (an admission not very consistent with the suggestion of the terror afterwards applied), but he asserts that he executed this contract, "being absent from his "regiment, without leave, alone with her, and "unknown to her father, and urged by her threats "of calling him in."—What was to be the effect of calling in the father, which produced so powerful an impression of terror in his mind, he does not explain; still less does he attempt to prove the *fact*, for he has not read the only evidence that could apply to it, the sworn answers of the lady to this

this statement of a transaction passing secretly between themselves, and in which answers it is positively denied. This averment of menace and terror is perfectly inconsistent with every thing that follows; with the reiterated declaration contained in No. 10, and with the letters which he continued to write in the same style for a year afterwards. Could the paper No. 10. have been executed by a man smarting under the atrocious injury of having been compelled by *menaces* to execute one of the like import? Could these letters, breathing sentiments of unalterable fondness, have been addressed to the person by whom he had been so treated? Nothing can be apparently more unfounded than this suggestion of menace and terror. It is said that it must be a *deliberate* contract. It is, I presume, implied in all contracts, that the parties have taken that time for consideration which they thought necessary, be that time more or less, for no where is there assigned a particular *tempus deliberandi* for the marriage contract, any more than for any other contract.

It is said that it must be *serious*, so surely must be all contracts; they must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever; at the same time it is to be presumed, that serious expressions, applied to contracts of so serious a nature as the disposal of a man or woman for life, have a serious import. It is not to be presumed *a priori*, that a man is sporting with such dangerous play-things as marriage engagements. Again it is said that the *animus contrahentium* must be regarded: Is that peculiar to the marriage contract? It is in the intention of the parties

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parties that the substance of every species of contract subsists, and what is beyond or adverse to their intent does not belong to the contract. But then that intention is to be collected (primarily at least) from the words in which it is expressed; and in some systems of law, as in our own, it is pretty exclusively so to be collected. You are not to travel out of the intention expressed by the words, to substitute an intention totally different and possibly inconsistent with the words. By the matrimonial law of *Scotland* a latitude is allowed, which to us (if we had any right to exercise a judgment on the institutions of other countries with which they are well satisfied) might appear somewhat hazardous, of substituting another serious intention than that which the words express, to be proved by evidence extrinsic, and totally, as we phrase it, *dehors* the instrument. This latitude is indulged in *Scotland* to a very great degree indeed, according to Mr. *Erskine*. In all other countries a solemn marriage in *facie Ecclesiæ facit fidem;* the parties are concluded to mean seriously, and deliberately, and intentionally, what they have avowed in the presence of God and man, under all the sanctions of religion and of law;—Not so in *Scotland*, where all this may pass, as Mr. *Erskine* relates, and yet the parties are at liberty to shew, that by virtue of a private understanding between themselves, all this is mere imposition and mockery, without being entitled to any effect whatever.

But be the law so, still it lies upon the party, who impeaches the intention expressed by the words, to answer two demands which the law, I conceive, must be presumed to make upon him; first, he must assign and prove some other intention; and secondly,

secondly, he must also prove that the intention so alleged by him, was fully understood by the other party to the contract, at the time it was entered into: For surely it cannot be represented as the law of any civilized country, that in such a transaction a man shall use serious words, expressive of serious intentions, and shall yet be afterwards at liberty to aver a private intention, reserved in his own breast, to avoid a contract which was differently understood by the party with whom he contracted. I presume, therefore, that what is said by Mr. *Craigie* can have no such meaning, "that if there is reason "to conclude, from the expressions used, that both "or *either* of the parties did not understand that "they were truly man and wife, it would enter "into the question whether married or not," because this would open a door to frauds, which the justice, and humanity, and policy of all law must be anxious to keep shut. In the present case no other *animus* is set up and endeavoured to be substituted, but the *animus* of avoiding danger, on which I have already observed. The assignment of that intent does almost necessarily exclude any other, and indeed no other is assigned; and as to any plea that it was differently understood by Miss *Gordon*, the other party in this cause, no such is offered, much less is any proof to that effect produced, unless it can be extracted from the letters.

Do they qualify the express contracts, and shew a different intention or understanding? It has been argued that they contain some expressions which point to apprehensions, entertained by Miss *Gordon*, that Mr. *Dalrymple* would resile from the obligations of the contract, and others that are intended

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intended to calm those apprehensions by promises of eternal fidelity, both which it is said are inconsistent with the supposition that they had knowingly constituted themselves husband and wife, and created obligations *de præsenti*, from which neither of them could resile.

In the first place, is there this real inconsistence? Do the records of this Court furnish no such instance as that of the desertion of a wife by her husband? And is such an occurrence so entirely out of all reasonable apprehension in a case like the present? Here is a young gentleman, a soldier, likely to be removed into a country in which very different ideas of marriage prevail, amongst friends who would discountenance this connection, and amongst numerous objects which might divert his affections, and induce him to repent of the step he had taken in a season of very early youth, and in a fit of transient fondness: That a wife left in that country exposed to the chances of a change in his affections,—to the effect of a long separation,—to the disapprobation of his friends,—to the impressions likely to be made by other objects upon a young and unsettled mind, should anticipate some degree of danger is surely not unnatural; equally natural is it, that he should endeavour to remove them by these renewed professions of constancy. But supposing that Miss *Gordon* really did entertain doubts with respect to the validity of her marriage, what could be the effect of such doubts? Surely not to annul the marriage, if it were otherwise unimpeached. We are, *at this moment*, enquiring with all the assistance of the learned professors of law in that country, amongst whom there is great discordance of opinion,

opinion, what is the effect of such contracts. That private persons, compelled to the necessity of a secret marriage, might entertain doubts whether they had satisfied the demands of a law which has been rendered so doubtful, will not affect the real sufficiency of the measures they had taken. Mr. *Dalrymple* might himself entertain honest doubts upon this point; but if he felt no doubt of *his own meaning*, if it was his intention to bind himself so *far as by law he could*, that is enough to sustain the contract; for it is not his uninformed opinion of law, but his real intention that is to be regarded, A *public* marriage was impracticable; he does all that he can to effect a marriage, which was *clandestine*, not only at the time, but which was intended so to continue. The language is clear and unambiguous in the expression of intent. No other intention is assigned: and it is not such expressions as these, arising naturally out of the feelings which must accompany such a transaction, that can at all affect its validity.

The same observations apply to the expressions contained in the later letters written to Mr. *Hawkins*. In one of them she says, "My "idea is, that he is not aware how binding his "engagements are with me," and possibly he might not. Still if he meant at the time to contract *so far by law as he could*, no doubts which accompanied the transaction, and still less any which followed it, can at all alter its real nature and effect. Miss *Gordon* had likewise her later hours of doubt, and even of despondency, "you will never see me Mrs. *Dalrymple*," she says, in the spring of 1807, to her sister; and when it is considered what difficulties she had to encounter,

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encounter, at what an immense distance she then stood from the legal establishment of her claims, having lost her hold upon his affections, it cannot be matter of great surprize, if in the view of a prospect so remote and cloudy, some expression of dismay and even of despair, should occasionally betray the discomposure of her mind. As to what she observes upon the alternative suggested by some friend, of a large sum of money in lieu of her rights (a proposition which she indignantly rejects) it seems to point rather to a corrupt purchase of her silence, than to any idea existing in her mind of a claim of damages, by way of a legal *solamen*, for the breach of a mere promissory contract.

The declarations, therefore, not being impeached by any of those disqualifications by which, in the law of *Scotland*, a contradictor is permitted to redargue and overcome the presumption arising from the production of such instruments, they become, in this stage of the matter, *præsumptiones juris et de jure* that found an instant conclusion of marriage, if I am right in the position that carnal copulation is not absolutely required to its completion. The fact that these papers were left in her single possession is insignificant, for it has well been observed by Dr. *Burnaby*, that it is not mutuality of *possession*, but mutuality of *intention*, that is requisite. It is much more natural that they should be left in the possession of the lady, she being the party whose safety is the more special object of protection, but there is no proof here, that Mr. *Dalrymple* himself is not possessed of a similar document. He anxiously requested to have one, and the non-production of it by him furnishes

furnishes no conclusive proof that he did not obtain his request. If he did not, it may have been an act of imprudence, that he confided the proofs of his marriage entirely to the honour of the lady; but if he did, it is perfectly clear that she has not betrayed the trust.

But I will now suppose that this principal position is wrong: that it is either extracted from erroneous authorities, or erroneously extracted from authorities that are correct. I will proceed then to enquire what proof there is of carnal copulation having taken place between the parties; and, upon this point, I shall content myself with such evidence as the general law requires for establishing such a fact: for I find no reference to any authority to prove that the law of *Scotland* is more rigid in its demand, where the fact is to be established in support of a marriage, than for any other purpose. It may have happened that the fact of carnal copulation has been established by a pregnancy, or some other evidence of as satisfactory a kind, in the few cases which have been transmitted to us, but I find no such exclusive rule as that which has been ingeniously contended for by Dr. *Edwards*; and I take it as an incontrovertible position, that the circumstances, which would be sufficient to prove intercourse in any other case, would be equally sufficient in this case. I do not charge myself in so doing, with going farther than the *Scotch* Courts would do, and would be bound to do, attending to the established rules of evidence.

In the first place I think it is most strongly to be inferred from the paper, No. 2, that some intercourse of a conjugal nature passed between these parties.

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parties. Miss *Gordon* therein says, "I hereby "promise that nothing but the greatest necessity, "(necessity which ——— situation alone can "justify), shall ever force me to declare this mar-"riage." Now what other possible explanation can be given of this passage, or how can it be otherwise understood than as referring to the consequences which might follow from such an intercourse? I confess that I find myself at a loss to know how the blank can be otherwise filled up, than by a supposition of consequences which would speak for themselves, and compel a disclosure.

I observe that Mr. *Dalrymple* denies, in his allegation, that any intercourse took place *after* the date of the written declarations, which leaves it still open to the possibility of intercourse *before* that time, though he certainly was not called upon to negative a preceding intercourse, in consequence of any assertion in the libel which he was bound to combat. It will, I think, be proper to consider the state of mind and conduct of the parties relatively to each other at this time. Preliminary verbal declarations of mutual attachment must at least have passed (as I have already observed) before the promise contained in No. 1. was written, at whatever time that paper was written. In the first letter, which bears the post-mark of the 27th of *May*, whether relying on this paper if it then existed, or on declarations which had verbally passed between them, he thinks himself entitled to address her as his wife in the most endearing terms. On the following day, the 28th, the instrument which has been produced is signed, by which they mutually acknowledge each other as husband and wife. Letters continue to pass between them daily,

daily, and sometimes more than once in a day, expressive of the most ardent and eager affection on his part, which can leave no room for the slightest doubt that he was, at that time, most devotedly attached to her person, and desirous of the pleasures connected with the enjoyment of it, in some way or other; for to what other motive can be ascribed such a series and stile of letters from a young man, writing voluntarily, without any appearance of idle pleasantry, and with every character of a sincere pursuit, whether honourable or otherwise. What was the state of mind and conduct of the lady during this period of time? It is not to be presumed, from the contents of his letters, that she was either indifferent or repulsive.

The imputation indeed, which has been thrown upon her, is of a very different kind, that she was an acute and active female, who with a knowledge of the law of the country, which Mr. *Dalrymple* did not possess, was endeavouring, *quâcunque viâ datâ*, to engage him in a marriage. To this marriage she has inflexibly adhered, and now stands upon it before this Court; so that whatever might be the real state of her affections towards this gentleman, (which can be known only by herself) this at least must be granted, that she was most sincerely desirous of this marriage connection, which marriage connection, both of them perfectly well knew, could not be publicly and regularly obtained. —Taking then into consideration these dispositions of the parties, *his* desire to obtain the enjoyment of her person on the one hand, and *her* solicitude to obtain a marriage on the other, which after the delivery of such instruments she knew might at all

 events

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events be effectually and honourably obtained by the mere surrender of her person, what is the probable consequence? In this part of the island the same circumstances would not induce the probability of a *private surrender*, because a *public ceremony* being here indispensibly required, no young woman, acting with a regard to virtue, and character, and common prudence, would surrender her person in a way which would not only not constitute a marriage, but would, in all probability, defeat all expectation of such an event.

In *Scotland* the case is very different, because, in that country, if there are circumstances which require the marriage to be kept secret, the woman, after such private declarations past, carries her virgin honours to the private nuptial bed, with as much purity of mind and of person, with as little violation of delicacy, and with as little loss of reputation, as if the matter was graced with all the sanctities of religion. It is in vain to talk of criminality, and of grossness, and of gross ideas. In such a case there are no other ideas excited than such as belong to matrimonial intercourse. It is the "bed undefiled" according to the notions of that country: it is the actual *ceremony* as well as the *substance* of the marriage: it is the conversion of the lover into the husband: *transit in matrimonium*, if it was not *matrimonium* before. A most forcible presumption therefore arises that parties so situated would, for the purpose of a secret marriage, resort to such a mode of effecting it, if opportunities offered; it must almost, I think, be presumed, that Mr. *Dalrymple* was in that state of incapacity to enter into such a contract, which

Lord *Stair* alludes to, if he took no advantage of such opportunities; for nothing but the want of opportunity can repel such a presumption.

Now how does the evidence stand with respect to the opportunity of effecting such a purpose? The connection lasted during the whole of Mr. *Dalrymple*'s stay in *Scotland*, and was carried on, not only by letters couched in the most passionate terms, but as admitted (and indeed it could not be denied), by nocturnal private visits, frequently repeated, both at *Edinburgh*, and at *Braid*, the country-seat of Mr. *Gordon*, in the neighbourhood of that city. Upon this part of the case six witnesses have been examined, who lived as servants in the family of Mr. *Gordon*. *Grizell Lyall*, whose principal business it was to attend on Miss *Charlotte Gordon*, one of the sisters, but who occasionally waited on Miss *Gordon*, says, "that Captain "*Dalrymple* used to visit in Mr. *Gordon*'s family "in the spring of 1804; that before the family "left *Edinburgh* she admitted Captain *Dalrymple* "into the house by the front door, by the special "order of Miss *Gordon*, in the evenings; that "Miss *Gordon*'s directions to her were, that when "she rung her bell once, to come up to her in her "bed-room, or the dressing-room off it, when she "got orders to open the street door to let in Cap- "tain *Dalrymple*; or when she (Miss *Gordon*) "rung her bell twice, that she should thereupon, "without coming up to her, open the street door "for the same purpose; that agreeably to these "directions she frequently let Capt. *Dalrymple* "into the house about nine, ten, or eleven o'clock "at night, without his ever ringing the bell, or "using the knocker; that the first time he came

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" in this way, she shewed him up stairs to the " dressing-room off the young ladies' bed-room, " where Miss *Gordon* then was, but that after- " wards upon her opening the door, he went " straight up stairs, without speaking, or being " shewn up; but how long he continued up stairs, " she does not know, as she never saw him go out " of the house; that the dressing-room above " alluded to, was on the floor above the drawing- " room, and adjoining to the bed-room, where the " three young ladies slept, and next to the ladies' " bed-chamber was another room, in which there " was a bedstead, with a bed and blankets, but no " curtains or sheets to the bed, and it was con- " sidered as a lumber room, the key of which was " kept by Miss *Gordon*."—She says that she recollects, and it is a fact in which she is confirmed by another witness, *Robertson*, " that the family " removed from *Edinburgh* to *Braid* that year, " 1804, on the evening before a King's Fast," (the King's Fast Day for that year was on the 7th of *June*), " and on a *Wednesday* as she thinks, as " the Fast Days are generally held on a *Thursday;* " that at this time Miss *Charlotte* was at *North* " *Berwick*, on a visit to Lady *Dalrymple;* that " Mr. *Gordon* and Miss *Mary* went to *Braid* in " the evening, but Miss *Gordon* remained in town, " as she *Lyall* also did, and Mr. *Robertson* the " butler, and one or two more of the servants."

It appears from the testimony of other witnesses, that Mr. *Gordon* her father, appeared much dissatisfied that this lady did not accompany himself and her sister to *Braid*, but chose to stay in town upon that occasion. There are passages in Mr. *Dalrymple*'s letters which point to the necessity of her continuance

continuance in town, as affording more convenient opportunities for their meeting. *Lyall* states, "that she recollects admitting Captain *Dalrymple* "that evening, as she thinks, sometime between "ten and twelve o'clock, and he went up stairs to "Miss *Gordon* without speaking; that on the next "morning she went up as usual to Miss *Gordon*'s "bed-room about nine o'clock, and informed her "of the hour; and having immediately gone "down stairs, Miss *Gordon* rung her bell some "time after, and on the Deponent going up to "her, she met her, either at the bed-room door "or at the top of the stairs, and desired her to "look if the street door was locked or unlocked; "and the Deponent having examined, informed "her that it was unlocked, and immediately after "went into the dressing-room, and, after being a "very short time in it, she heard the street door "shut with more than ordinary force, which "having attracted her notice, she opened the "window of the dressing-room which is to the "street, and on looking out she observed Capt. "*Dalrymple* walking eastwards from Mr. *Gor-* "*don*'s house; that from this she suspected "that Captain *Dalrymple* was the person who "had gone out of the house just before; that "nobody could have come in by the said door "without being admitted by some person within, "as the door did not open from without, and she "heard of no person having been let into the "house on this occasion; that having gone down "stairs after this, Mr. *Robertson*, the butler, ob- "served to her, *that there had been company up* "*stairs last night;* but she did not mention to "him any thing of her having let in Capt. *Dal-*

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" *rymple* the night before, or of her suspicions of " his having just before gone out of the house, " at least she is not certain, but she recollects that " he desired her to remember the particular day " on which this happened." —Now from this account given by *Lyall*, the Counsel have attempted to raise a doubt, whether it was Mr. *Dalrymple* who went out, for it is said that he would have cautiously avoided making a noise for fear of exciting attention. But the account *Lyall* gives is exactly confirmed by *Robertson*, who deposes, " that on the 7th of *June*, which was " the King's Fast, as he was employed about ten " o'clock in the morning in laying up some china " in his pantry, which is immediately off the lobby, " he observed Captain *Dalrymple* come down " stairs, and passing through the lobby to the " front door, unlock it, and go out and shut the " door after him." Some observations have been made with respect to *Robertson*'s conduct, and he has been called a forward witness, because he made a memorandum of this circumstance at the time it occurred; but I think his conduct by no means unnatural. Here was a circumstance of mysterious intercourse that attracted the attention of several of the servants, and it is not at all surprising that this man, who held a superior situation amongst them in Mr. *Gordon*'s family, and who appears to be an intelligent, well educated, and observing person, as many of the lower order of persons in that country are, should think it right, in the zeal he felt for the honour of his master's family, to make a record of such an occurrence. In so doing, I do not think that he has done any thing more than is consistent with the character of a very honest

honest and understanding servant, who might foresee that such a record might, one day or other, have its use. The witness *Lyall* goes on to say, "that Miss *Gordon* and herself went to *Braid* that "day (being the King's Fast) before dinner, and "that on that evening, or a night or two after, "she was desired by Miss *Gordon* to open the "window of the breakfasting parlour to let Captain "*Dalrymple* in, and she did so accordingly, and "found Captain *Dalrymple* at the outside of the "window when she came to open it, and this "she thinks might be between ten and twelve "o'clock, and she shewed him up stairs, when "they were met by Miss *Gordon* at the door of "her bed-chamber, when they two went into said "chamber, and she returned down stairs; that "she does not know how long Captain *Dalrymple* "remained there with Miss *Gordon*, or when he "went away;" she states that "Miss *Charlotte* "returned from her visit at *North Berwick* a few "days after Miss *Gordon* and the deponent went "to *Braid;* that at *Braid* Miss *Gordon* and Miss "*Charlotte* slept in one room, and Miss *Mary* in "another; that within Miss *Gordon* and Miss "*Charlotte*'s bed-chamber there was a dressing-"room, the key of which Miss *Gordon* kept; and "she recollects one day getting the key of it from "Miss *Gordon* to bring her a muff and tippet out "of it, and upon going in she was surprised to "find in it a feather-bed lying upon the floor, "without either blankets or sheets upon it, so far "as she recollects: that it struck her the more, "as she had frequently been in that room before "without seeing any bed in it; and as Miss "Gordon kept the key, she imagined she must

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" have put it there herself; that she found this bed " had been taken from the bed-chamber in which " Miss *Mary* slept, it being a double bedded room; " that when she observed the said bed in the dress- " ing room, it was during the time that Captain " *Dalrymple* was paying his evening visits at " *Braid*; that upon none of the occasions that she " let Captain *Dalrymple* into *Braid House* did she " see him leave it, nor did she know when he " departed." Three other witnesses, *Robertson* and the two gardeners, have been examined upon this part of the case, and they all prove that Mr. *Dalrymple* was seen going into the house in the night, or coming out of it in the morning.

It is proved likewise that *Porteous*, one of the servants, was alarmed very much, that the window of the room where he kept his plate, was found open in the morning, and that it must have been opened by somebody on the inside: It is proved that nothing was missing, not an article of plate was touched, and that Mr. *Dalrymple* was seen by the two gardeners very early in the morning, coming away from the house, and in the vicinity of the house, going towards *Edinburgh*; and as to what was suggested that he might have been in the out-houses all night, I think it is not a very natural presumption, that a gentleman who was privately and habitually admitted into the house at such late hours as eleven or twelve o'clock at night, would have been ejected afterwards for the purpose of having so uncomfortable a situation for repose, as the gentlemen suppose, in some of the stables or hovels, belonging to the house.—There is another witness of the name of *Brown*, Mr. *Dalrymple*'s own servant, whose evidence is strongly corrobo-

rative

rative of the nature of those visits. This man is produced as a witness by Mr. *Dalrymple* himself, and he states that he was in the habit of privately conveying notes from his master to Miss *Gordon*, which were to be concealed from her father.—He says to the second interrogatory, "that he often "accompanied his master to Mr. *Gordon*'s house "at *Edinburgh*, but he cannot set forth the days "upon which it was he so attended him there, "except that it was between the 10th of *May*, "and the 18th of *July* 1804," subsequently therefore to the execution of the last paper. This witness further states, "that *on the night of the* "18th *of July*, which was the last time Mr. *Dal-* "*rymple* was in or near *Edinburgh* in the said "year 1804, he, by the orders of his master, "waited with the curricle at the house of "*Charles Gordon*, Esq. till about twelve o'clock, "when Mr. *Dalrymple* came out of the said "house, and got into the curricle, and rode "away therein about a mile on the road towards "*Edinburgh*, and then desired him to stop, and "having told him to go and put up his horses in "*Edinburgh*, and to meet him again on the same "spot at six o'clock the next morning with the "curricle, Mr. *Dalrymple* then got out, and "walked back towards the said Mr. *Gordon*'s "house, and on the next morning at six o'clock "he met his master at the appointed spot, and "brought him in his said curricle to *Haddington*, "from whence he went in a chaise to the house of "a Mr. *Nisbet*, in the neighbourhood of that town, "where Mr. *Dalrymple*'s father was then staying; "that *he does believe that Mr.* Dalrymple *did*, "*on the night of the said* 18*th of* July, *go back to*, "*and*

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" *and remain in the said Mr.* Gordon's *country-* " *house* :" and I think it is impossible for any body who has seen this man's evidence, and the evidence of the other witnesses, not to suppose that he did go there, and did take his repose for the night in that house. Now it is said, and truly said, in this case, that the witness *Lyall,* upon her cross examination, says, " she does not think that " they could have been in bed together, so far as " she could judge ;" what means she took to form her judgment does not appear; the view taken by her might be very cursory: she is an unmarried woman, and might be mistaken with respect to appearances, or the appearances might be calculated for the purposes of deception, in a connection which was intended to be, to a great degree, secret and clandestine. But the question is not what inference *Lyall* draws, but what inference the Court ought to draw from the fact proved by her evidence, that Mr. *Dalrymple* passed the whole of the night in Miss *Gordon's* room under all the circumstances described, with passions, motives, and opportunities all concurring between persons connected by ties of so sacred a nature.

Lady *Johnstone,* one of her sisters, has been relied upon as a strong witness to negative any sexual intercourse; and I confess it does appear to me rather an extraordinary thing, that that lady's observations and surmises should have stopped short where they did, considering the circumstances which might naturally have led her to observe more and to suspect more: she certainly was kept in the dark, or at least in a twilight state. It rather appears from the letters, that there were some quarrels and disagreements between

tween Mr. *Dalrymple* and the gentleman who afterwards married this lady, and who was then paying his addresses to her; how far that might occasion concealment from her I cannot say. The father, for reasons of propriety and delicacy respecting himself and family, was to be kept in ignorance, and therefore it might be proper that only half a revelation should be made to the sister. She certainly states that upon her return to *Braid*, in the middle of *June*, she slept with her sister, and never missed her from her bed, and never heard any noise in the sister's dressing-room which led her to suppose that Mr. *Dalrymple* was there. I am far from saying that this evidence of Lady *Johnstone*'s is without weight: In truth, it is the strongest adverse evidence that is produced on this point: But she admits, "that from what she "had herself observed, she had no doubt but that "Mr. *Dalrymple* had made his addresses to her "sister in the way of marriage; that when the "deponent used to ask her said sister about it, "she used to laugh it off:" From which it appears that Miss *Gordon* did not communicate freely with her upon the subject. She says, "that never till "after the proceedings in this cause had com- "menced had she heard that they had exchanged "written acknowledgments of their being lawful "husband and wife, and had consummated their "marriage; but, on the contrary, always, till "very lately, conceived that they had merely en- "tered into a written promise with each other, "so as to have a tie upon each other, that neither "of them should marry another person without "the consent of the other of them." That is the interpretation this lady gives to the paper No. 10, though

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though that paper purports a great deal more, and she says, "that although she did suspect that "Mr. *Dalrymple* had at some time or times been "in her sister's dressing-room, yet she never "did imagine that they had consummated a mar-"riage between them." But since it is clearly proved by the other witnesses that Mr. *Dalrymple* was in the habit of going privately to Miss *Gordon*'s bed-room at night, and going out clandestinely in the morning, I cannot think that the ignorance of this witness respecting a circumstance with regard to which she was to be kept in ignorance, can at all invalidate the facts spoken to by the other witnesses, or the conclusion that ought to be deduced from them.

With respect to the letters written at such a time as this, I am not disposed to scan with severe criticism the love-letters of a very young gentleman, but they certainly abound with expressions which, connected with all the circumstances I have adverted to, cannot be interpreted otherwise than as referring to such an intercourse. I exclude all grossness, because, considered as a conjugal intercourse, it carries with it no mixture of grossness but what may be pardonable in a very young man, alluding to the raptures of his honey-moon, when addressing the partner of his stolen pleasures. I will state some passages, however, which appear to point at circumstances of this nature:—"My "dearest sweet wife—You are, I dare say, happy at "*Queen's Ferry*, while your poor husband is in this "most horrible place, tired to death, *thinking only* "*on what he felt last night, for the height of human* "*happiness was his.*" It is said that this has reference only to the happiness which he enjoyed in her

society,

society, for an expression immediately follows, in which he extols the happiness of being in the society of the person beloved: and it may be so, but it must mean society in a qualified sense of the word, *private* and *clandestine* society; society which commenced at the hour of midnight, and which he did not quit till an early hour (and then secretly) in the morning. That *society* is meant only in the tamest sense of the word, is an interpretation which I think cannot very well be given to such expressions as these, used upon such an occasion. In the letter marked No. 6, he says, "Put off the journey to *Braid*, if possible, till "next week, as the town suits so much better for "all parties. I must consult *L*. on that point to-"morrow, as I well know how a-propos plans "come into her pretty head; there appears to "me only one difficulty, which is where to meet, "as there is only one room, but we must obviate "that if possible." In the next letter, No. 7, he says, "But I will be with you at eleven to-morrow "night; meet me as usual.—P.S. Arrange every "thing with *L*. about the other room."

There are several other expressions contained in these letters which manifestly point to the fact of sexual intercourse passing between them. These I am unwilling to dwell upon with any particular detail of observation, because they have been already stated in the arguments of counsel, and are of a nature that does not incline me to repeat them without absolute necessity; I refer to the letters themselves, particularly to No. 4, and No. 6. But it is said, here are passages in these letters which show that no such intercourse could have passed between them; one in particular in No. 4, is much dwelt

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dwelt upon, in which he says, "Have you forgiven "me for what I attempted last night; believe me "the thought of your cutting me has made me "very unhappy." From which it is inferred that he had made an attempt to consummate his marriage, and had been repulsed. Now this expression is certainly very capable of other interpretations: It might allude to an attempt made by him to repeat his pleasures improperly, or at a time when personal or other circumstances might have rendered it unseasonable. In the very same letter he exacts it as *a right*. He says, "You will pardon "it; although it was my right, yet I make a de-"termination not too often to exert it; what a night "shall I pass without any of those heavenly com-"forts I so sweetly experienced yesterday."

In a correspondence of this kind, passing between parties of this description, and alluding to very private transactions, some degree of obscurity must be expected. Here is a young man heated with passion, writing every day, and frequently twice in a day, making allusions to what passed in secrecy between himself and the lady of his affections; surely it cannot be matter of astonishment, that many passages are to be found difficult of exact interpretation, and which it is impossible for any but the parties themselves fully to explain. What attempt was made does not appear; this I think does most distinctly appear, that he did at this time insist upon his rights, and upon enjoying those privileges which he considered to be legally his own. Wherever these obscure and ill-understood expressions occur, they must be received with such explanations as will render them consistent with the main body

and

and substance of the whole case. Another passage in the letter No. 5, which is dated on the 30th of *May*, has been relied upon as shewing that Mr. *Dalrymple* did not consider himself married at that time. In that letter he says, "I am "truly wretched, I know not what I write, how "can you use me so? but (*on Sunday, on my* "*soul* *) you shall, you must become my wife, "it is my right," and therefore it is argued that she had not yet become his wife. The only interpretation I can assign to this passage, which appears to have been written when he was in a state of great agitation, is, that on *Sunday* she was to submit to what he had described as the rights of a husband. It is not to be understood that a public marriage was to be executed between them on that day, because it is clear, from the whole course and nature of the transaction, that no such ceremony was ever intended: It appears from all the facts of the case, that it was to be a private marriage, that it was so to continue, and therefore no celebration could have been intended to take place on that approaching *Sunday*.

In a case so important to the parties, and relating to transactions of a nature so secret, I have ventured to a exercise a right not possessed by the advocates, of looking into the sworn answers of the parties upon this point: and I find Miss *Gordon* swears positively that intercourse frequently passed between them subsequently to the written declaration or acknowledgment of marriage. Mr. *Dalrymple* swears as confidently that it did not so take place, but he admits that it did on some one

* Torn.

night

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night of the month of *May*, prior to the signature of the paper marked No. 1; the date of which, however, he does not assign, any more than he does that of the night in which this intercourse did take place. Now consider the effects of this admission. It certainly does often happen that men are sated by enjoyment; that they relinquish with indifference, upon possession, pleasures which they have eagerly pursued: But it is a thing quite incredible that a man, so sated and cloyed, should afterwards bind himself by voluntary engagements, to the very same party who had worn out his attachment. Not less inconsistent is this supposition with the other actual evidence in the case, for all these letters, breathing all these ardors, are of a subsequent date, and prove that these sentiments clung to his heart as closely and as warmly as ever during the whole continuance of his residence in *Scotland*. I ask if it is to be understood, that with such feelings he would relinquish the pleasures which he had been admitted to enjoy, and which he appears to value so highly, or that she would deny him those pleasures for the consolidation of her marriage, which she had allowed him, according to his own account, gratuitously and without any such inducement.

On this part of the case I feel firm. It is not a point of foreign law on which it becomes me to be diffident; it is a matter of fact examinable upon common principles; and I think I should act in opposition to all moral probabilities, to all natural operations of human passions and actions, and to all the fair result of the evidence, if I did not hold that consummation was fully proved. If this is proved, then is there, according to the common

consent

consent of all legal speculation on the subject, an end of all doubt in the case, unless something has since occurred to deprive the party of the benefit of a judicial declaration of her marriage.

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What has happened that can have such an effect? Certainly the mere fact of a second marriage, however regular, can have no such effect. The first marriage, if it be a marriage upheld by the law of the country, can [illegible] no competitor in any second marriage, which can by legal possibility take place; for there can be no second marriage of living parties in any country which disallows polygamy. There may be a ceremony, but there can be no second marriage—it is a mere nullity.

It is said that, by the law of *Scotland*, if the wife of the first private marriage chooses to lie by, and to suffer another woman to be trepanned into a marriage with her husband, she may be barred *personali exceptione* from asserting her own marriage. Certainly no such principle ever found its way into the law of *England*; no connivance would affect the validity of her own marriage; even an active concurrence, on her part, in seducing an innocent woman into a fraudulent marriage with her own husband, though it might possibly subject her to punishment for a criminal conspiracy, would have no such effect. But it is proper, that I should attend to the rule of the law of *Scotland* upon this subject. There is no proof, I think, upon the exhibition of *Scotch* law, which has been furnished to the Court, that such a principle was ever admitted authoritatively; for though in the gross case of *Campbell* versus *Cochrane*, in the year 1747, the Court of Session did hold this doctrine, yet it

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was afterwards retracted and abandoned, on the part of the second wife, before the House of Lords, which, most assuredly, it would not have been, if any hope had been entertained of upholding it as the genuine law of *Scotland*, because the second wife could never have been advised to consent to the admission of evidence, which very nearly overthrew the rights of her own marriage. Under the correct application of the principles of that law, I conceive the doctrine of a *medium impedimentum* to be no other than this, that on the *factum* of a marriage, questioned upon the ground of the want of a serious purpose, and mutual understanding, between the parties, or indeed on any other ground; it is a most important circumstance, in opposition to the real existence of such serious purpose and understanding, or of the existence of a marriage, that the wife did not assert her rights, when called upon so to do, but suffered them to be transferred to another woman, without any reclamation on her part. This doctrine of the effect of a mid-impediment in such a case, is consonant to reason and justice, and to the fair representations of *Scotch* law given by the learned advocates, particularly by Mr. *Cay*, in his answer to the third additional interrogatory, and Mr. *Hamilton*, in his answer to the first further additional interrogatory; but surely no conduct on the part of the wife, however criminal in this respect, can have the effect of shaking *ab initio* an undoubted marriage.

Suppose, however, the law to be otherwise, how is it applicable to the conduct of the party in the present case? Here is a marriage, which at the earnest request of this gentleman, and on account of his most important interests (in which interests

her own were as seriously involved) was not only to be secret at the time of contracting, but was to remain a profound secret till he should think proper to make a disclosure; it is a marriage in which she has stood firm in every way consistent with that obligation of secrecy, not only during the whole of his stay in *Scotland*, but ever since, even up to the present moment. She corresponded with him as her husband till he left *England*, not disclosing her marriage even to her own family on account of his injunctions of secrecy. Just before he quitted this country, he renewed in his letters those injunctions, but pointed out to her a mode of communicating with him by letter, through the assistance of Sir *Rupert George*, the first Commissioner of the Transport Board. In the same letter, written on the eve of his departure for the Continent, he cautions her against giving any belief "to a "variety of reports which might be circulated "about him during his absence, for if she did, "they would make her eternally miserable. I "shall not explain," he says "to what I am "alluding, but I know things have been said, and "the moment I am gone will be repeated, which "have no foundation whatever, and are only meant "for the ruin of us both: once more, therefore, I "entreat you, if you value your peace or hap-"piness, believe no report about me whatever."

No doubt, I think, can be entertained, that the reports to which he, in this mysterious language, adverts, must respect some matrimonial connections, which had become the subjects of public gossip, and might reach her ear. Nothing, however, less than certain knowledge was to satisfy her, according to his own injunction, and nothing

 could,

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could, I think, be more calculated to lull all suspicion asleep on her part. It appears, however, that it had not that complete effect, for Mr. *Hawkins* says, that upon the return of Mr. *Dalrymple*, in the month of *August* 1806, when he came to *England* privately without the knowledge of his father, or of this lady, he then, for the first time "communicated to him many circumstances "respecting a connection, he stated he had had, "with a Miss *Johanna Gordon* at *Edinburgh*, and "expressed his fears that she would be writing "and troubling his father, upon that subject, as "well as tormenting him the said *John William* "*Henry Dalrymple* with letters, to avoid which, "he begged him not to forward any of her letters "to him who was then about to go to the Con-"tinent, and in order to enable him to know her "hand-writing, and to distinguish her letters from "any others, he then cut off the superscription "from one of her letters to him, which he then "gave to the deponent for that purpose, and "at the same time swore, that if he did forward "any of her letters, he never would read them; "and he also desired and entreated him to prevent "any of Miss *Gordon*'s letters from falling into "the hands of General *Dalrymple*, and that he "went off again to the Continent in the month of "*September*." Mr. *Hawkins* further says, "that "he did find means to prevent several of Miss "*Gordon*'s letters addressed to General *Dalrymple*, "from being received by him, but having found "considerable risque and difficulty therein, and in "order to put a stop to her writing any more "letters to General *Dalrymple*, he the deponent "did himself write and address a letter to

" her at *Edinburgh*, wherein he stated that the
" letters, which she had sent to General *Dalrymple*,
" had fallen into his hands to peruse or to answer,
" as the General was himself precluded from
" taking any notice of letters from the precarious
" state he was in, or to that effect, and urged
" the propriety of her desisting from sending any
" more letters to General *Dalrymple*; and the
" deponent having, in his said letter, mentioned
" that he was in the confidence of, and in corre-
" spondence with Mr. *Dalrymple*, she soon after-
" wards commenced a correspondence with him
" respecting Mr. *Dalrymple*, and also sent many
" letters, addressed to Mr. *Dalrymple*, to him, in
" order to get them forwarded; but the deponent
" having been particularly desired by Mr. *Dal-*
" *rymple* not to forward any such letters to him,
" did not send all, but thinks he did send one or
" two, in consequence of her continued impor-
" tunities;" he says, " that it was some time in
" the latter end of the year 1806, or the beginning
" of the year 1807, that the correspondence
" between Miss *Gordon* and himself first com-
" menced; and that after the death of General *Dal-*
" *rymple*, which he believes happened in or about
" the spring of the year 1807, she, in her correspon-
" dence with him, expressly asserted and declared
" to him her marriage with Mr. *Dalrymple*."

It appears then that Miss *Gordon* knew nothing of Mr. *Hawkins*, except from the account he had given of himself, that he was the confidential agent of Mr. *Dalrymple*, and therefore she might naturally have felt some hesitation about laying the whole of her case before

 him,

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him, especially as General *Dalrymple* was alive, till whose death the marriage was to remain a profound secret; but upon that event taking place, which happened at no great distance of time, Miss *Gordon* instantly asserted to Mr. *Hawkins* her marriage with Mr. *Dalrymple*, and he, wishing to be furnished with the particulars, wrote to her for the purpose of obtaining them, which, she thereupon communicated, and at the same time sent him a copy of the original papers, which, in the language of the law of *Scotland*, she called her *marriage lines*.—She mentioned likewise some bills which had been left unpaid by her asserted husband, upon which he wrote to Mr. *Dalrymple*, and he says, "that he has no doubt Mr. *Dalrymple* "received the letters, because he replied thereto "from *Berlin* or *Vienna*, and caused the bills to "be regularly discharged." He says, "that in "the latter end of *May*, in the year 1808, Mr. "*Dalrymple* returned again to *England*."—I ought to have mentioned that it appears clearly, that Miss *Gordon* had been sending letters to Mr. *Hawkins*, expressive of her uneasiness on account of the reports which had prevailed of a marriage about to be entered into by Mr. *Dalrymple*. She says, in a letter to Mr. *Hawkins*, "I shall have no hesita-"tion in putting my papers into the hands of a "man of business, and establishing my rights, as "it is a very unpleasant thing to hear different "reports every day; the last one is, that Mr. *Dal-*"*rymple* had ordered a new carriage on his mar-"riage with a nobleman's daughter."

This description cannot apply to the marriage which has since taken place with Miss *Manners*, but

is merely some vague report, which it seems had got into common discourse and circulation. On the 9th of *May*, she writes to know whether any accounts had been received from Mr. *Dalrymple*, and says, " Any real friend of Mr. *Dalrymple*'s ought to " caution him against forming any new engage- " ment ;" and she protests most strongly against his entering into a matrimonial connection with another woman.—In the end of that very month of *May*, Mr. *Dalrymple* came home, having been at different places on the continent; he went down to Mr. *Hawkins*'s house at *Findon*, where having met him, they conversed together upon Mr. *Dalrymple*'s affairs, and particularly upon his marriage with Miss *Gordon*, and on that occasion, Mr. *Hawkins* having at this time no doubt left upon his mind of the marriage, and fearing from the manner and conduct of Mr. *Dalrymple*, that he had it in contemplation to marry Miss *Manners*, the sister of the Duchess of *St. Alban's*, he cautioned him in the most anxious manner against taking such a step, and in the strongest language which he was able to express, described the mischiefs which would result from such a measure, both to himself and the lady, and the difficulties in which their respective families might be involved, owing to Mr. *Dalrymple*'s previous marriage.

Mr. *Hawkins* thought, at the time, that those admonitions had had the good effect of deterring him from the intention of marrying Miss *Manners*, though he mentions a circumstance which bears a very different complexion, *viz.* that Mr. *Dalrymple* took from him, almost by force, some of Miss *Gordon*'s letters, and particularly those annexed to the allegation.

 He

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He says, "that Mr. *Dalrymple* took them under "pretence of shewing them to Lord *Stair*, and "seemed by his manner and expressions to consider that he had thereby possessed himself of "the means of shewing that *Johanna Dalrymple* "was not his wife." It was about the end of the month of *May*, that Mr. *Hawkins* and Mr. *Dalrymple* held this conversation at *Findon*, and upon the 2d of the following month, Mr. *Dalrymple* was married to Miss *Manners*, before it was possible that Miss *Gordon* could know the fact of his arrival in *England*. Upon her knowledge of the marriage, she immediately proceeds to call in the aid of the law.—I profess I do not see what a woman could with propriety have done more to establish her marriage rights; Mr. *Dalrymple* was all the time abroad, and the place of his residence perfectly unknown to her; no process could operate upon him from the Courts, either of *Scotland* or *England*, nor was he amenable in any manner whatever to the laws of either country.

She did all she could do under the obligations of secrecy, which he had imposed upon her, by entering her private protest against his forming any new connection; she appears to me to have satisfied the whole demands of that duty, which such circumstances imposed upon her; and I must say, that if an innocent lady has been betrayed into a marriage, which conveys to her neither the character nor rights of a wife, I cannot, upon any evidence which has been produced, think that the conduct of Miss *Gordon* is chargeable, either legally or morally, with having contributed to so disastrous an event.

Little

Little now remains for me, but to pronounce the formal sentence of the Court, and it is impossible to conceal from my own observation the distress which that sentence may eventually inflict upon one, or perhaps more individuals; but the Court must discharge its public duty, however painful to the feelings of others, and possibly to its own; and I think I discharge that duty in pronouncing, that Miss *Gordon* is the legal wife of *John William Henry Dalrymple* Esq. and that he, in obedience to the law, is bound to receive her home in that character, and to treat her with conjugal affection, and to certify to this Court that he has so done, by the first Session of the next Term.*

* From this decree an appeal was alleged and prosecuted to the Court of Arches. In the course of those proceedings an intervention was given for *Laura Dalrymple*—described as wife of *John William Henry Dalrymple* Esq. the Appellant in the cause. On the 3d Session of *Mich.* Term, *viz.* 18th of *November* 1811, an allegation was asserted on her behalf, and the Judge assigned to hear, on the admission thereof, on the by-day. On that day, *viz.* 4th of *December*, her Proctor prayed the assignation to be continued, which was opposed; and the Judge concluded the cause, and assigned the same for sentence on the next court day. On the first Sess. *Hil.* Ter. *viz. January* 1812, her Proctor alleged the cause to have been appealed: and the appeal was accordingly prosecuted to the High Court of Delegates, where the grievance complained of was, "that the Judge of the Court of "Arches had rejected the prayer, of the said *Laura Dalrymple*, "for *time* to be allowed for the admission of an allegation on her "behalf." Time was allowed by the Court of Delegates—And the cause being there retained, her allegation was given in, and opposed, and ultimately rejected. The cause was afterwards heard upon the merits; and on the 19th of *January* 1814, the sentence of the Consistory Court was affirmed.

THE OFFICE OF THE JUDGE PROMOTED BY

COX v. GOODDAY.

7th *Dec.* 1810.
1st *Feb.* 1811.

Offence under the st. 5 & 6 E. 6. c. 4. as charged against the Clergyman, for words spoken during Divine Service — Defence — that they were justifiable as reproof, — not sustained.

THIS was a cause of Office promoted by *Hannah Cox*, a Parishioner and Inhabitant of *Terling*, *Essex*, against The Reverend *William Goodday*, Vicar of the said Parish, "for the lawful correction and reformation of his manners and excesses, especially for *quarrelling*, *chiding*, and *brawling*, by words, in the said Parish Church of *Terling*."

On the part of Mr. *Goodday*, Drs. *Arnold* and *Burnaby* objected to the admission of the articles, on the ground, that they only imputed matter of an admonitory nature, such as was the duty of the Clergyman to express, upon his seeing an impropriety committed during the time of Divine Service, and therefore did not come under the offence meant by the statute.—On the other side, the admission was supported by Dr. *Swabey* and Dr. *Edwards*, upon the words of the articles themselves; pleading, "that "during the sermon he, Mr. *Goodday*, was preach- "ing, he did, without any just cause or provocation "whatever, and with great warmth and passion, "and with a loud voice, address the complainant "from the pulpit, to the following effect: "Miss "*Cox*, I have observed the most indecent beha- "viour from you in this Church from time to time, "and if you cannot behave better, I will order the "sexton to turn you out; I have represented "you to the Bishop, and will again; and if that will "not do, I will put you into the Spiritual Court." The articles further stated, "that as Miss *Cox* and "her sister, to whom he had administered the "Sacrament in the morning, were going out of the "Church, he said, "let them go, let them go to a "playhouse, and act their acts there."

JUDG-

Cox *v.* Goodday.

7th *Dec.* 1810, & 1st *Feb.* 1811.

JUDGMENT.

Sir *W. Scott.* — This is a proceeding against a Clergyman, on the statute of *Edward* VI., for *brawling* and *chiding* in a Church. This statute was made to repress the disturbances, that in the early ages of the Reformation were too apt to arise between the Professors of different religions. It has since been applied further — to repress quarrels and offences violating the sacred character of those places. This statute is not absolutely necessary to found the jurisdiction of the Ecclesiastical Court; as It has undoubtedly a right to punish offences in disturbance of public worship. There must be some jurisdiction in reason and in principle to effect this; and it properly belongs to the Ecclesiastical Court. It has been objected, that the offence charged, does not come within the words of the statute; and perhaps it is not necessary that it should, on the observations which I have made.

Here a Clergyman is charged, that *without any just cause* or *provocation*, he did, with a loud voice, and in a quarrelling manner, address the complainant in the words that have been set forth; and, it has been said, that this is no offence at all — no more than reproof, which a Minister is justified in using, and bound to use, against an impropriety of conduct. It is impossible to say that cases may not arise, which would justify such an act, as far as was necessary to remove an obstruction to the public service.

In this case, part of the charge in the articles is, that no offence had been committed by the lady, to call for this public reproof — that will be a subject of evidence hereafter to be adduced. At present,

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present, and for the mere purpose of admitting the articles, I am to consider that such was the fact, and that there was no cause for such interposition. The words that were used, are, in my opinion, of a *chiding*, *quarrelling*, and *brawling* nature, even if expressed without any tone of passion; for the words themselves are of a passionate tenor. The articles state also, that, in the morning, he had administered to the parties the Holy Sacrament. I think, this is not so immaterial as to be improper to be admitted to stand, — that they were persons who had been admitted to the Holy Communion. It may aggravate the imprudence of this language: —The words are very particular — "Let them go to the "play-house, and act their acts there." — It is difficult to assign any meaning, that can be defended from the charge of impropriety, to such words — uttered in such a place, and on such an occasion; they cannot, upon the most tender consideration, be deemed to come within the bounds of decorum and propriety. It will be for the Clergyman to justify himself; and if he does not, it will be the bounden duty of this Court to say, that he has exceeded his duty.

1st *Feb.* 1811.

On this day, Mr. *Goodday* appeared in person, and gave an affirmative issue to the articles; when it was prayed, on the part of the promoter, that the Court would suspend Mr. *Goodday*, from the administration of his office, so long as It should deem meet — and condemn him in costs.

JUDGMENT.

Sir *William Scott.* — Mr. *Goodday* — You have been proceeded against for *brawling* in the Church, of

of which you are the Minister. The articles state that you did so, during a sermon which you were preaching, addressing yourself to Miss *Cox*, in the manner which is there pleaded. You have admitted the substance of these articles, and of course you have admitted what the articles charge, that *this was done without any offence committed by Miss Cox*, that called for any censure. You have therefore admitted that you have been betrayed into a public act of indiscretion; and it becomes my duty, as representing the Bishop, to recommend greater caution in the future exercise of your public functions.

The duty of maintaining order and decorum in the Church, lies *immediately* upon the Churchwardens, and if they are not present, or being present do not repress any indecency, they desert their proper duty. The Officiating Minister has other duties to perform, those of performing Divine Service. In saying this, I do not mean to say, that occasions may not occur, in which it may not be justifiable, and even unavoidable, for him to take a part in suppressing any disorder or interruption in the Church. It is rather unfortunate when they do occur; and if they do, they ought to be used with the most guarded prudence and gravity. If passion is interposed, it is apt to break out in unseemly expressions, such as may be deemed to have been indulged on the present occasion: — They produce surprise and discomposure in the Congregation, may endanger the engaging the Minister himself in scenes of altercation, and contention, that may derogate from the proper dignity of his functions, and may produce unhallowed consequences, very inconsistent with the purposes, for which himself and the assembly are

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are collected together. In the present case, you have admitted, that no such occasion had occurred, as called for your interposition. It becomes therefore my painful duty to admonish you to guard your zeal with more temper and discretion — and I so admonish you; and further, I must, in obedience to the statute, suspend you from the administration of your office for one fortnight, to be computed from this day. But as you have appeared in person to receive this admonition, I shall not think it necessary to order the publication of the sentence in the Church, or to enlarge further upon the subject.

POUGET *v.* TOMKINS, FALSELY CALLING HERSELF POUGET.

24th *Jan.* 1812.

Nullity of marriage, by reason of *false* and *imperfect* publication of banns. Omission of one Christian name, which had been the name most commonly used — *fatal.*

THIS was a suit of nullity of marriage brought by the father of *William Peter Pouget*, as guardian of his son, by reason of minority, and want of consent, and the publication of *banns*, in names not corresponding to the true name of the parties, as required by the marriage act.

JUDGMENT.

Sir *William Scott.* — This is a proceeding to annul the marriage, which has been had between these parties, at the suit of the father, by reason of publication of banns in false names, connected with the minority of the husband, and want of consent of his father.

The suit is brought by the father, as guardian of the son, who is much under age, being, at the time of the marriage, of the age of 16 years only, having been born on the 5th of *May* 179[illegible], and married

married on the 28th *January* 1810, at *St.Andrew's, Holborn*, though his father's residence was in *Marylebone*. The alleged wife was a servant in the family, and her age is not particularly stated. I have letters from her exhibited, which shew that she was an uneducated woman, but nothing which marks her age, a circumstance that might have been material, in a case of this kind, in which fraud is charged. It appears that he was described, in the publication, as *William Pouget*, instead of *William Peter Pouget*. In strictness, I conceive, that all parts of a baptismal name should be set forth, as composing altogether the name and legal description of the party. At common law they are all set forth, and, if any part is omitted, it is ground for a plea in abatement. In proclamation of banns, it is also highly proper, that they should be enumerated; at the same time I cannot go so far as to say that, in all cases, it is absolutely and essentially necessary, and that the publication would, on account of such omission alone, *in all cases*, be invalidated. Where there was no fraud intended, nor any deception practised, and where the suppression was only of a dormant name, that had not been generally used, it might be too much to hold, that a perfectly honorable marriage should be invalidated by such omission.

The case might be put also, that one party had wilfully suppressed a dormant name, not known to the other, for the purpose of reserving a plea for invalidating that marriage at a future time. That would be an effect, which the law would be unwilling to give to an omission so practised. Where, however, there is fraud intended, and where the omission is not casual, but intentional, and made a principal part

of

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of the machinery of the fraud, I should hold, that the Court would be bound to enforce the most literal interpretation, for the purpose of supporting the true spirit of the act.

It has been said, in argument, that the Court is forbidden to inquire into the publication of the banns, for the purpose of shewing a false residence contained in it, after the marriage has been actually celebrated; but this exception, on which that restraint is expressed, shews, that the Court is at liberty to inquire into the manner, in which the banns have been published, for the purpose of shewing that, in other respects, that publication was vicious, and consequently the marriage was void. It remains therefore only to consider, to what class of cases this particular case belongs. The minor's name of baptism was *William Peter*, and it is proved, by the testimony of his family, that the first name, *William*, had been superseded in common use, and that he had been constantly called *Peter*. The grandmother says, that, from his baptism, her grandson has been constantly addressed, by the christian name of *Peter* only, by his relations and friends, and is scarcely known by his other name of *William*, except to his near relations. It is also proved that, in various letters written by him to his father, he commonly subscribed himself *Peter Pouget;* but that, since the commencement of this suit, the witness has observed the signature of *Peter William Pouget.* In two letters of the party, against whom the suit is brought, she addresses him by the name of Mr. *Peter;* so that it is clear that, although *William* was a baptismal name, it had been almost obliterated in common use; and the name of *William Pouget* would

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would not have described him to most persons so as to notify him. The name that was kept out of the publication was the only one, by which the party had usually been known. To effect a marriage then with *William Peter Pouget* under the unknown description of *William Pouget* only, is unquestionably a fraudulent act, being under a description which does not properly belong to the party; but must be considered as assumed, for the required purpose of notification, with intention of falsehood. By what preliminary steps the marriage was brought about, does not appear; since nothing transpires before the attempt to publish banns at *Highgate*, which miscarried. One of the witnesses, *Mary Hemming*, who speaks to this fact, says, "that she received from *William Peter* "*Pouget*, a paper containing the names of himself "and the said *Lucretia Tomkins*; that he sent her "in a coach to order the banns for their marriage "to be put up in *Highgate* Church, but on her "delivering the same to the clerk, he asked her if "the parties resided in the parish? to which she, "after some hesitation, answered, she believed "they did, but that she did not know where; "and in consequence, as she apprehends, of the "clerk's not believing her, the banns were not "published."

It appears in this case, that the banns, on which the marriage took place, were delivered by the minor — that circumstance would not take away the fraud, which is not charged to be committed on the boy, but on the rights of the father; and though it might have been a grosser case, if it was proved that the party, charged with the fraud, had been more active in giving the banns herself, yet it

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21th *Jan.* 1812.

it makes no material difference that they were delivered by the boy, so far as regards the fraud upon the parent. The account which the same witness gives of the marriage is, "that the parties were "married in the presence of her, the deponent, "by the name of *William Pouget*, as she recollects, "from the clergyman putting several questions, "and being very particular in his name and place "of residence, to which he answered, that his "names were *William Pouget;* and being con- "fused, Mr. *Wyatt*, the brother-in-law of the said "*Lucretia Tomkins*, gave evasive and untrue an- "swers for him, as to his residence." It may indeed be inferred from this, that this person had probably been a principal mover in the business, though this does not distinctly appear from any other part of the transaction. It is clear, however, that banns were published in the name of *William Pouget*, omitting *Peter;* that the father and family was entirely ignorant of the transaction, and not informed of it till some months afterwards, when they expressed their surprise and grief at what had happened.

The Act of Parliament recites, "that great in- "conveniences have arisen from clandestine mar- "riages," and proposes to provide against them in future: for that purpose it directs the true names and residence to be given to the minister, in writing, seven days before, or he is not obliged to publish the banns, though he is not forbidden so to do. It has been matter of regret that this provision of the act has not been more generally observed. The clear intention of the act is, that the true names of the parties should be published; and, if they are not so published, it is no publica-

 tion:

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tion: no notice is given, and no opportunity is afforded to any one to allege an impediment. It has been constantly held therefore, since the case of *Early* v. *Stevens* *, that a publication in false names is no publication.

It was pleaded in the libel, that, at the time of publication at *St. Andrew's, Holborn*, the parties were not living in that parish, but, at his father's residence, in another parish. It was pleaded as a circumstance of fraud; and it was objected to on the admission of the libel, as in violation of the 10th section of the Marriage Act, which forbids the Court to inquire into the fact of such residence. It was answered, that it was not done for the purpose of invalidating the marriage, but merely to shew the fraudulent character of this transaction, from the conduct of the parties. The article was admitted with hesitation by the Court, and subject to future objections; and if it was necessary to decide on that point, I should entertain very strong doubts; as the words of the act are very exclusive, "that it shall not be allowed to be done touching "the validity of the marriage;" and if I was called upon to determine, I should still hesitate to admit that article. It is however unnecessary, as the same inference arises from other parts of the transaction not liable to the same objection. The attempt to have the banns published at *Highgate*, and the behaviour of the parties on that occasion, sufficiently establish the fraudulent purpose.

All these circumstances proclaim the fraud. If the age of the wife had appeared, the case of fraud might have been still stronger. What the actual

* Consist. 1785.

 disparity

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disparity was does not appear. The boy was a school boy, of sixteen years only, and, at any rate, to be presumed much younger than the wife. It is not a case of casual omission, and where one party has committed a fraud upon the other — in either of which cases the Court might have possibly hesitated; but a confederacy of both to deceive the father. Under this view of the case, I am of opinion, that the suppression of one baptismal name is such a false description, as will be sufficient to render the marriage null and void.



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2d *Feb.* 1813.

Divorce by reason of cruelty, on words of menace, accompanied by violence, &c.

THIS was a case of divorce, by reason of cruelty, brought by *Elizabeth Mary Harris* against her husband, *William Harris*, of the parish of *St. Dunstan, Stepney*.

JUDGMENT.

Sir *William Scott*.—This is a suit brought by the wife, for separation by reason of cruelty, in which there is no defensive allegation on the part of the husband; and the Court has only to determine, how far the prayer of the wife is supported by the facts stated by the witnesses, who have been examined on her libel. The Court is not in the habit of interfering in ordinary domestic quarrels; and there may be much unhappiness, from unkind

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treatment, or violent and abusive language, in which parties can obtain no relief in this form; but must be left to correct the intemperance, of which they complain, by such private means as they can employ for the purpose. There must be something which renders cohabitation unsafe, or is likely to be attended with injury to the person, or to the health of the party, in order to sustain an application to this Court. Words of menace may partake of either of these characters; they may be merely the language of passion, or they may be the expression of determined malignity, which, if they are likely to be carried into effect, may warrant the Court to interpose, and prevent the actual mischief which is thus threatened. Where such violence of language is accompanied with blows, it is a more aggravated case, and the mischief is actually inflicted. It is impossible for the Court to say, there has not been that species of ill-treatment in the present case.

It is proved by the evidence of the servants, who appear to have given a very impartial testimony, and even speak favorably of the husband's affectionate behaviour to his children, that he had been in the constant habit, for a considerable time, of insulting his wife with the most opprobrious language; and I see nothing to induce the Court to suspect that these witnesses have spoken with undue colour, or partiality, in the accounts which they have given.

The first matter complained of, is an act of violence in *May* 1803, of which there is no direct evidence; but the Court has, I think, sufficient proof that a blow was actually given. The two sisters of the wife say "that in *June* 1803 she had,

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" for some time, abstained from her usual visits " to her father's house, and that when she came, " on being asked the cause of her absence, and " being questioned as to a mark on her chin, she " declined at first to say any thing, and did not " appear eager to complain; but, on being pressed, " she said 'she had received a blow from her " husband with a poker;' and they further allege, " that the mark continued for some time." There is also a confession of the husband, which supports this statement, at a later occasion, when he admitted to *Elizabeth Jackson*, " that he had *struck* " *her before*;" which must be taken either as an acknowledgment of this blow, or as adding to the number of injuries of which the wife has to complain. That she bore this treatment with all the patience that can be required from a wife, is also satisfactorily proved. It appears further, that she was deposed from the management of her family, which was given to his sister, *Ann Harris*; that she was not permitted to dress suitably to her situation in life; and that she had been obliged to resort to the kindness of her own family, for occasional supplies of money. The terms *fool*, *devil*, and *liar*, are amongst the mildest that were applied to her. There is evidence of a threat " to " throw a knife in her face, at the time when he " actually had a knife in his hand; and also that " he would knock her head off;" words which are well calculated to excite just alarm in a mind of greater firmness, than she probably possessed.

The only suggestion that is offered to the Court in exculpation is, that she had habits of contracting debts, which might justify the severity of taking the management of her family from her.

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But when the Court sees the manner in which she was kept as to her own dress, It has reason to suppose that if these habits were satisfactorily proved, which they are not, they were still not more than the husband himself may be considered to have occasioned. The facts, above referred to, are spoken to by *Jane Benson*, who says, "that on "one occasion, in the year 1811, there was a "quarrel, on account of some allowance she had "received from her father, for her own use, which "the husband wanted to apply to domestic pur- "poses, to buy the children some shoes, and that "he flew into a great passion, and abused her "father as a villain and a fool." I see no reason to think, that she was not fully justified in the use, which she proposed to make of the allowance, or that it was other than was intended by her father.

The same witness, on the 12th article, speaks to a quarrel at supper, in which the husband swore "that if she did not mind what she was about, he "would throw a knife in her face." On the 11th of *September* there is satisfactory evidence, in the depositions of *Sarah Chalk*, of a blow "given by "a tea-cup, and that the child came down stairs "and said, that his father had thrown a tea-cup "at his mother, and had cut her face and it bled; "that she immediately went up, and saw a cup "broken all to pieces in the room, and the wife's "face bleeding, and there was a scar on her face for "some time after. That, about seven months ago, "the husband asked the deponent if she had "heard any thing about the cup, and she told "him what the child had said, and he could not "deny it." His silence, in conjunction with the

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circumstances stated, leaves no doubt on the mind of the Court as to the truth of this fact.

On the 14th of *November* there was another outrage, which led to the final separation. This happened in consequence of some dispute, about the testamentary dispositions of her father's will. On this *Ann Cole* says, " that on the night of the " father's funeral, Mr. *Harris* asked her to let " him see her father's will, which she refused; " that, after some altercation, Mr. *Harris* said to " his wife, she might go as soon as she liked, for " she should have no peace while she was in the " house. That on some day in the same month " of *November* she heard a scuffle in the parlour " at ten o'clock at night, and she heard the said " *Elizabeth Harris* open the door and say 'Now " I am off;' that she went up stairs; that her " master came out from the room, and desired " the deponent to leave her alone; that Mrs. " *Harris* went out of the house, and the husband " shut the door after her."

It may be thought rather singular, that though this happened in the presence of *Ann Harris*, the sister of the husband, she says, " that she was sit- " ting between them after supper, with her elbow " on the table, and her head on her hand, and " she did not see either of them." It is further proved, however, by his own admission to two persons, " that he had put himself in a menacing " attitude, and thrust his fist in her face with " *some violence*," as he acknowledged to one witness, *Ford;* and " that her infant child was in " her arms at the time;" though he denies the violence to the other witness, *Elizabeth Jackson.*

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On these facts the Court is called upon to prevent the repetition of such outrages, and It has no hesitation in pronouncing for the separation, as prayed on behalf of the wife.

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WARING *v.* WARING.

16th *July* 1813.

Suit of Divorce brought by the wife, for cruelty. —Justification, from the conduct of the wife, sustained.

THIS was a suit for separation and divorce, by reason of cruelty, brought by the wife, in which a libel had been given in stating the charge, a defensive allegation on the part of the husband, and a responsive allegation on the part of the lady.

The usual proceedings being had, the case was argued by Dr. *Arnold* and Dr. *Lushington* on the part of the wife, and by Dr. *Adams* and Dr. *Jenner* on the part of the husband, on the facts appearing in the observations of the Court.

JUDGMENT.

Sir *William Scott.*—This is a proceeding by the wife against the husband for divorce, by reason of cruelty, and likewise originally of adultery. It appears that the parties were married in 1800, and that there are five children of that marriage. In 1811 the wife left her husband, and applied to this Court for a divorce, on the charge of cruelty and adultery; though that of adultery has not been pursued. A letter indeed has been introduced, annexed to the interrogatories, on which some observations, tending that way, have been made. But it is impossible

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possible for the Court to take up the suggestion in that form, as the other party has had no opportunity of contradicting it. I shall therefore follow the example of the party herself, by dismissing that charge from any further consideration. The case, therefore, standing on the single charge of cruelty, must be maintained on the usual principles, which require that such complaints should be supported by proof of violence and ill-treatment, endangering, or at least threatening, the life, or person, or health of the complainant.

Suits of this nature are usually brought by the wife, as the more infirm party, though they may be also brought on the part of the husband, and have been so brought, with effect, in cases before this Court. When the wife is the complainant, presumptions of injury may be derived from the comparative weakness of her constitution. It is not, however, impossible, that she may have been the aggressor, and, by provocations, have brought upon herself the ill-treatment complained of; when that appears, she is not entitled to demand relief from the Court: it is the consequence of her own conduct, and she has the remedy in her own hands, by an alteration of her conduct; and if the law was not backward in its interference in such a case, it would furnish the wife with a very short course to a sentence of separation, if she wished it, for she would have nothing to do but to provoke ill-treatment by ill-behaviour. I do not mean by this, that every slight failure of duty, on the part of the wife, is to be visited by intemperate violence on the part of the husband. The correction of such failings must be softened, by a due recollection of

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human infirmity, and of the tender relation subsisting between such parties; and there may be cases of that kind, provoked by the wife, but unduly visited by the husband, in which the Court would not decline to interfere. But if the conduct of the wife is inconsistent with the duties of that character, and provokes the just indignation of the husband, and causes danger to her person, she must seek the remedy for that evil, so provoked, in the change of her own manners. There is reason to hope, that such a remedy would not be ineffectual; but should it prove otherwise, it may then be the proper opportunity for application to the powers of the Court. Under these observations I proceed to consider the evidence by which the charge is supported.

It appears certainly, that there had been grievous family dissensions between these parties, not becoming the decorum of their situation in life, or the duties of their relation to each other. Much gross abuse, coarse language, personal struggles, proceeding to the annoyance and disturbance of the neighbourhood, — such, indeed, as the Court has seldom observed, in other such cases, to have come before its notice. But it does not necessarily follow that the husband is to blame, or is the only one to blame; for it may have been the fault of both, or of the complaining party herself alone.

On the view of the witnesses these observations occur, that they are chiefly servants, respecting whom it is a common remark, that they usually give but unsatisfactory representations of scenes of this kind, of many of which they can, in fact, know but little — for they have seen but little, — nothing of the cause or commencement, and but little

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little till near their conclusion, which usually brings more noise along with it, and so compels their attention. The greater number of these witnesses are produced by the complainant; they are females, and naturally range themselves on the side of their own sex; but their prejudices and partialities (for prejudices and partialities such persons are subject to) may have been thrown on the other side, by occurrences that have happened to themselves in the family: A passionate wife may have been a passionate mistress, and they will judge and speak according to their own supposed injuries. Three are cook-maids, who, from their situation, could see but little; they intrude when the battle has raged for some time, and become loud and vehement. Two are house-maids, liable to the same objection, that they come in only towards the close of hostilities. The butler had better access, but does not appear to have made the best use of his opportunities. A surgeon, Mr. *Cooper*, likewise produced, appears to have had some little differences with the husband, which may have insensibly coloured his evidence; but, in truth, his knowledge of facts, resulting from his own observation, is not very considerable. In one passage of his evidence, he says, "that the attention "of Mr. *Waring* to his wife was not what it should "have been." This is matter of opinion; it may depend on the different warmth of feeling in different men, and, being merely negative, is hardly sufficient to sustain a charge of legal cruelty.

Mr. *Utterson*, who describes his house to be the next door to her own, says, "that she came to his "house in a state of great distress, which affected "him;" but he knows nothing of the commencement

ment or cause of that quarrel, to which she attributed it, and can speak only to present appearance; and perhaps the husband, if he had come, might have come in a state of equal disorder, and of course might have excited equal sympathy.

Many of the witnesses speak of frequent noises, of the lady calling for assistance from the windows, and other circumstances which indicate a state of great disorder and confusion in the house. But many of them are liable to the objection on which I have already observed, that the persons, to whom she appeals, were not present at the origin of the outcries to which they speak. It by no means follows, that those who cry out the loudest have been the most peaceable. What might appear harsh or offensive to such persons, might be justified, or palliated, by the circumstances out of which the treatment arose. That which is violent if aggressive, may be justified or excused if defensive: and if the wife gave the first blow—if she was the *prior lædens*—though to return it may not be manly, the law will allow for human infirmity, under such gross and scandalous indignity. The general substance of the evidence of these persons is, on that account, not entitled to much credit; but even of these, several impute the blame to the party complainant.

I come to the evidence of Mr. *H. Waring*, who has been examined on both sides, and has therefore that voucher of impartiality from both. He speaks also with that moderation which entitles him to ample credit from the Court. He says that there were faults on both sides. He saw them daily, and describes the conduct of the wife in their

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their quarrels to have been provoking, and that it soon became violent.

The account of general behaviour, that is given by several of the servants, is unfavourable enough; she frequently put herself in violent passions—often said provoking things to him, which made him quarrel with her—that she would refuse to go down to dinner—and sent irritating messages to him by his child. That, at other times, she would order dinner not to be prepared for him—that she would sometimes lock him up in his room—and that he was once obliged to get out of the window. These are particulars selected from the depositions of *Margaret Chapman*, the servant who waited on them; of *Elizabeth Wickens*, *Lucy Wickens*, and *Sarah Wickens*, who are examined on the part of the wife, and give this description of her conduct, which proves it highly reprehensible; and which might be expected to provoke a husband's resentment, and in which she must be considered as the authoress of her own wrongs, and not entitled to seek relief from the Court.

I must next discharge from the case, those parts of the libel to which no evidence has been adduced:—that he gave to her an emetic, with an intention to produce a miscarriage; on which there is no evidence whatever but what rests on the declaration, that she herself made to the surgeon, and to a servant; and seeing the manner in which she has indulged herself, in the representations which she has made of her husband, I do not think that any statement, so founded, can be accepted as entitled to credit. I have looked into the answers, and find that he denies this imputation positively on oath. He says, indeed, "that he may have "advised

" advised her to take such medicine; but posi-
" tively denies that it was done with any such
" motive."

Another charge which is totally destitute of proof is, that she was left without money in his absence; the fact appearing to be directly the reverse.

Another, that he compelled her to come down to dinner, when she had just miscarried. That she came down when she was infirm in health is certainly true, but nothing further is proved, except her own complaints, on which, considering the general colour of her assertions, the Court cannot confidently rely.

It is pleaded, that the husband had forbidden her to hold intercourse with her own family for several years; and it was not without hesitation, that the Court admitted that article to stand, for although it may be a harsh exercise of marital authority, there may be circumstances that will justify that prohibition. And the Court could ill judge of the reasonableness of such an injunction. Though the wife may be very amiable, her connexions *may not* be so, and there may be many reasons which would justify such exclusion.*

* The coincidence of legal reasoning, in distant ages and countries, is not unworthy of remark.—The propriety of sustaining such a restriction, under certain circumstances, is noticed in the *Jewish* Law.—" Si quis uxori dixerit, nolo veniat ad me " pater tuus, mater tua, frater tuus, soror tua, obtemperandum est. " Si quid igitur his adversum accidat, uxor ad ipsos sese con- " ferat. Isti contra non ibunt visere ad mulierem, nisi si subito " quid ei contigerit, morbus, puerperium; nemo enim homo vi " cogitur alios ad se admittere."—*Maimonides de Matrim. Judæorum*, ch. 13. s. 14.

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It appears however that some coolness had taken place on pecuniary matters, as he thought that he was ill-treated by her father, on whose recommendation he had furnished some articles of merchandize to a person, for which he thought him responsible, though the father did not so consider it.

The husband complains that the wife threw the note from her father, on this subject, into the fire, and she admits, in her own plea, that she told the husband what would fully justify such a surmise on his part.

Whatever may be the result of the evidence on these points, the principal facts may be considered to be three in number, on which the counsel for the wife admit, that if they are not proved, so as to entitle her to the legal consequence of separation, the suit must entirely fail.

The first is that which is pleaded in the eighth article of the libel, in these terms: "That, on the "night of the 6th *April* 1808, *James Waring*, "without any provocation, put himself in a vio-"lent passion, swore at her most violently, insisted "that she should go out of the house that instant; "attempted to drag her, by force, from the fire, "where she was sitting; and, with great force "and violence, beat her head against the marble "chimney shelf, and thereby broke the comb "which was in her hair, and the broken part "thereof was forced into her head; that, by the "violence of such blow and the pain occasioned "thereby, the said *Marianne Waring* fell to the "ground, and the said *James Waring* then dragged "her by the arm along the floor, with an intention "of putting her out of the room, but her screams "having brought the servants into the room, the said

"said *James Waring*, upon seeing them, imme-
"diately left the room."

The servants, who have been examined, came in in the heat of the battle, and knew little of what led to it. It turns out, however, that the parties had been invited to spend the evening with Mrs. *Rule*, and that there was some altercation about a coach; though it is deserving of remark, that the sister did not mention the preliminary quarrel in her examination *in chief*, nor till she was pressed by the interrogatories, that were addressed to her, on that fact. In *chief* she had said, that a quarrel ensued just as they were going out, and that the complainant was so much agitated by the altercation, that she determined on staying at home; and she speaks of the latter part of this history nearly to the effect of the plea: But on the interrogatory she says, "that Mr. *Waring* went
"alone, because the wife sent her to him to ask
"to have a coach, and on his answering in the
"negative, that she went again in about ten mi-
"nutes to ask the same question, to which he
"replied as before; but on the weather proving
"rainy, he sent down one of the children to order
"a coach to be called, and when he came down
"dressed, was angry that the servant had not
"brought one; and, from the lateness of the
"time, and the uncertainty of getting a coach,
"he went alone, leaving his wife and the depo-
"nent to follow."

I see no reason, in this statement, why the parties should be seriously dissatisfied with each other. It appears, however, from Mrs. *Rule*'s evidence, "that
"a message was sent afterwards, at nine o'clock,
"by her, at Mr. *Waring*'s request, desiring that

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" she would come, or explain whether she would or not; that, on delivering the message, the servant " was instructed to say, by Mrs. *Waring*, 'that Mr. " *Waring* himself could best tell the reason;' and, " with this message, the servant was sent back."

I cannot but think that this was improper behaviour on her part, and that such a message could be intended only to expose her husband to the ridicule or censure of the company. Such conduct was irritating; and it is not surprising that it should bring home a provoked husband.

What passed at first, on his return, appears only from the sister's statement; and when I consider how much she had made herself a party, by not dissuading the wife from sending such a message, I think her account improbable in itself, and related under impressions that tend to weaken its credit. She says, " that they were sitting up for " him, when he returned, about twelve o'clock, " in a violent passion, passed the deponent with- " out saying a word, caught hold of his wife, and " jirked her off her chair, by which she was " thrown the whole length of the hearth, and " struck her head against the mantle-piece, and " broke her comb into her head; that he dragged " her across the room, when she screamed, and " the servants came in." When they entered the room, it appeared there had been a quarrel. *Wells* says " that she and another servant came " up, and found Mrs. *Waring* on the ground, cry- " ing 'Oh! my head!' to which the husband " replied, with an oath, 'Yes, and oh! my head " too;' and said, he would have his wife's sister " out of the house, as he could not live in the " house with them."

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It appears, then, that Both were complaining. The next day they were reconciled, and dined together; though I cannot but think, that, if the outrage had happened, quite in the extent described in her allegation, and by the sister in evidence, she would have put herself immediately under the protection of her friends.

The substance of all the evidence on this part of the case is, that she gave provocation in not going to the party, and still grosser in sending the message which has been described; that there was a conflict on his return, which is described as a scuffle, in which both parties complained; that they dined together amicably the next day on a formal reconciliation, effected by Mr. *Abernethy*, at the instance of her father.

It appears from the evidence of Mr. *Abernethy* that "soon after the husband went to *Ireland*, "and on the 8th of *January* 1808, when he, Mr. "*Abernethy*, informed Mrs. *Waring* that her hus-"band was coming home, she burst into a passion "of tears—continued hysterical all the day—ex-"pressed her disgust and dislike of her husband—"and said 'she wished he might never return, "but be drowned in his passage.'" Connect this expression with the irritating message which had before been sent by the child, and I ask, if this was an outrage that could be expected but from a female, who had so surrendered her mind, and her tongue, to ungovernable passion.

After this there is every thing ungracious on both sides, particularly on her's, but no open quarrel, until that which happened at *Sandgate* in 1809; and of which there is a particular account in the evidence of Mr. *H. Waring*.

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The account of their general manner of living together is certainly not very favourable to her. From the evidence of the women servants, " *that* " *she ordered no dinner to be prepared for him* — " *that at times she was outrageous, particularly* " *about the marriage*"—and many other particulars, I collect, that the system of the wife's conduct must have tried, most effectually, any husband's temper. It is stated also by them, that she contradicted him in every thing, which he bore in a way rather inconsistent with the irritability of temper, which is ascribed to him. The general tenor of this description gives great credit to what is stated by Mr. *H. Waring*, " that he has heard her say, " 'that she would oblige her husband to make her " a separate maintenance, and would have £600 " *per ann.* settled upon her; and if he did not, " she would make his life as uncomfortable as " she could.'" Mrs. *English* mentions the same fact, though she speaks only of £80 *per annum;* and that she, the witness, made some observations on the smallness of the sum; to which Mrs. *Waring* replied, " that she would make it " do, by boarding in a family, rather than live " with him." It is not improbable, that she might mention different sums at different times. That she had the design of forcing a separation, is established beyond all contradiction, and such conduct could not possibly be pursued for any other purpose.

A particular fact, which I next proceed to examine, is, that which is stated in the tenth article of the libel, and of which Mr. *H. Waring* gives the following account. He says, " that she came " into the drawing-room, and asked the deponent

" to walk out with her to see some fireworks, which " the husband refused. She replied, if he would not suffer them to go, he should not go out him- " self—that she went out and immediately locked " the door of the room; he forced the door with the " poker, and, whilst he was opening it, she stood " on the outside provoking him; he gave her a " slap on the face with his open hand, but not " enough to do her any injury. She attacked him, " pulled off his wig, and carried it down stairs, " and soon afterwards returned with the poker " and threatened to strike him, on which he went " into the bed-room," she carrying off the wig, the *opima spolia* of this not *incruenta victoria.* In the mean time " he followed her in vain, asking " for and attempting to recover his wig, which had " been pinned up in the window curtains of the " drawing-room, and not discovered and *recap-* " *tured* till the next day. That she went to the win- " dow and threw it up, and, by her screams, col- " lected a concourse of people round the house."

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Elizabeth Wickens says, in continuation of this contest for the wig, " that Mr. *Waring* being with- " out his wig, made inquiries of his servants, and " of this deponent, respecting it; and when the " family were just setting off from *Sandgate,* " which was the following day, Mrs. *Waring* then " told *Susan Wickens,* the deponent's sister, that " her master's wig was in one of the drawing-room " window curtains." It is difficult to speak on such scenes with gravity, if they did not, most seriously, affect the peace and happiness of the family. In this instance the lady appears to have taken the law into her own hands, and those hands were most energetically employed.

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It is not to be wondered at that he came home to town in anger. Reconciliation was attempted by their friends—and it might have been hoped that a sense of duty would have returned. Something of that kind appears indeed, in one letter, which has been exhibited, acknowledging her misconduct. He required, that she should retract the former *dreadful expressions*, which are not mentioned, though threats of hers are mentioned; and she does consent to retract, thereby acknowledging that they had been used, and *were* unfit to be used. It has been observed that this was wrung from her; however that may be, it certainly appears that she was not sincere, for she made various disavowals. Her subsequent conduct was quite the reverse of what should have followed a sincere retractation; her very penance was little short of renewed provocation.

The last act, which led to the final separation, was on the 22d *January* 1811. Of this also we have an account from Mr. *H. Waring*, in the 7th article of the allegation, on the part of the husband, who says, "that the husband asked him to "go to the play, and she desired that they would "wait till the next day, that she might go with "them, to which the husband replied, that he "would go the next day too; but the wife answered "that he was not going to the play, but to a mis- "tress, and immediately left the room, and he "heard the house-door locked, and the door lead- "ing into the area."

Suppose her suspicions were even true, is it the proper way to regain the affections of a husband, to turn his castle into a gaol, and for the wife to become his gaoler? Such conduct would lead more likely

likely to the very opposite result, and drive the object of such treatment to the comforts of some more indulgent society; for, to commit an act of false imprisonment, is a singular measure for breaking up an illicit connexion, and calling back his wandering affections. " She returned to the room, " and he then demanded the key, which she refused " to give up. He desired her to observe, that he " did not mean to use violence; but he attempted " to take it from her pocket, on which she flew to " the bell, and screamed out murder. He said again " he would not hurt her, but he would have the " key," as he had certainly a good right to insist. A struggle ensued—the servants came up, and one of them desired that she would give him the key, to which she replied " How can you plead " for such a villain." What must be the effect of an answer like this? He is locked up in his own house, his servants remonstrating for him. A further scuffle ensued; " the lady threw a small " trunk at him, and aimed a blow at his head with " a candlestick. She then got him down in a " chair, and bit his nose, and said if he would " promise not to go out, she would give up the " key," which was at last obtained on something like a conditional surrender.

After this, the consequence followed that was quite unavoidable: the husband found it necessary to effect, by any means, the dismission of his wife; and I cannot say, that, if he was reduced to the unhappy dilemma of being deprived of his liberty, and locked up in his own house, or of parting from his wife, either Law or Reason would frown upon him, with much severity, if he preferred the latter alternative. I shall not enter into

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WARING v. WARING.

16th *July* 1813.

the consideration of the mode, which he took to effect this purpose; all that follows being nothing more than the natural sequel of this history, which has degraded the attention of this Court for nearly three days.

On this state of the evidence, the Court is not entitled to say, that either party was entirely without blame. To entertain personal scuffles with a woman and a wife is a cruel necessity; but a man may protect and defend his own life and liberty. It is a difficult task to return blows, let them come from whom they may, with words only. Force may be opposed, and in some cases must be opposed by force; but supposing that some portion of blame is imputable to the husband, there is enough to warrant the Court to pronounce, that a wife, who is guilty of such conduct, is not entitled to complain.

I forbear to observe further on her behaviour in these scenes, lest it might look too much like the indignation, which every Court must feel, but would willingly repress, on having such behaviour brought before it. I recommend to her the duty of self-examination, and to consider whether a proper change, in her own conduct, may not be the most effectual remedy for the evil of which she complains, and consist better with her duty to her husband, her children, and herself.—In the hope that such a change may take place, I dismiss the complaint, and exonerate her husband from further attendance.

PARNELL *v.* PARNELL.

2d *Jan.* 1814.

Committee of a lunatic competent to institute a suit of divorce, by reason of the adultery of the wife, on behalf of the lunatic.

THIS was a suit of divorce by reason of the adultery of the wife, instituted on the part of the husband, who was a lunatic, by his *committee*.

The admission of the libel was opposed, on the ground, that there was no authority for a proceeding in this form; that, although the general right of lunatics to sue by their committees could not be denied, it was subject to some limitations; that, in cases of importance, it was the common practice for the committees to take the directions of the Lord Chancellor, who usually referred the case to the Master, to ascertain whether the suit would be beneficial to the lunatic. That the prayer of separation, in this libel, was unnecessary, as it was pleaded, that the parties had had no intercourse since 1797, in consequence of the lunacy which still continued; that no such case had occurred before; and, it was submitted, that the Court would not entertain a complaint of this nature, which depends so much on the acts and disposition of the husband, on a suit instituted by any other person.

In support of the libel, it was contended, that a lunatic may sue by his committee, and more particularly when it is for his benefit or protection; that it would be highly prejudicial to the lunatic to prohibit proceedings of this nature,

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as he might have a spurious issue imposed upon him; that if the husband should recover, he might receive his wife again; but that, in the mean time, it was of the greatest importance to him that the misconduct of his wife should be established by legal proceedings, as it might affect the nature of the relations between them; that, although there was no precise case in point, there had been stronger cases; as in *Morison* v. *Morison* *, and in *Fust* v. *Bowerman* †, the proceedings for nullity had been brought by the committee, and sustained.

JUDGMENT.

Sir *William Scott.*—I am not aware of any case which has occurred precisely similar to the present; it must therefore be decided not on express authority, but on principle, or rules of analogy, drawn from other authorities, which are clear and undisputed. The question resolves itself into two points: first, whether a lunatic is put out of the protection of the law; and secondly, if he is not, whether there is any other mode in which redress can be obtained. On the first there can be no doubt; and it never can be asserted, that the wives of lunatics should be universally released from the duties of their marriage vow. It would be an imputation on the law of this country, to suppose that it had not provided some remedy against such a mischief. Then in what way is this protection to be afforded? It must be, I conceive, in the same way as in other cases, by the committee, who is the officer appointed by the Lord

* Arches, 1745. † Arches, 22d *Feb.* 1790.

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Chancellor to represent him, who is the guardian of all lunatics, and to whom the person, and estate, and family of the lunatic, are entrusted. The lunatic cannot personally institute the suit, and therefore he must act by his ordinary guardian. It is true, as has been observed, that, in complicated matters, the committee ordinarily applies, to the Lord Chancellor, for authority to sue; but I do not know, that it would be advisable to promote a suit before the Lord Chancellor, preparatory to proceedings of this nature. This Court has no authority over the committee to require, that he should make an application to it. It is bound, I conceive, to receive his plea, when brought before it, as matter of right. On these grounds, and upon principle, the powers of the committee must be upheld, to protect the lunatic from the greatest of all possible injuries.

But looking further, to the rules of analogy, which govern other cases of persons who, on account of disability, are allowed to sue by their guardian, as in the case of infants. How then does the case stand? The committee also brings suits in other instances. In suits of nullity, that power has been recognized and allowed. In the case of *Fust* v. *Bowerman* the committee was permitted to proceed: that was a stronger case. In these proceedings the wife can sustain no injury, as the lunatic will have the power of condonation, if he recovers, or he may stand on what has been done for him. I am of opinion, therefore, that the libel is entitled to be admitted.

DAYS, FALSELY CALLED JARVIS, *v.* JARVIS.

1st *March* 1814.

Nullity of marriage by *licence*, by reason of minority and want of consent, sustained.

THIS was a suit of nullity of marriage, instituted by *Elizabeth Hannah Days*, spinster, described as falsely called *Jarvis*, and wife of *Samuel Raymond Jarvis* esquire, of *St. Marylebone, Middlesex*, against him, on the ground of his minority, and the want of legal consent to the marriage, which was celebrated by licence.*

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* The facts of this case appeared to be, That Mr. *Jarvis* was born at *Lambeth*, on the 26th of *February* 1786, and baptized there as the son of *Samuel Lancelot Jarvis* and *Frances Sophia Ligonier Jarvis* his wife. In consequence of a commission he held in the *Durham* militia, he was stationed, for some time, in that part of the country, and there formed the acquaintance with Miss *Days*, which led to the marriage in question. The marriage took place clandestinely on the 2d of *May* 1805, at *Monk Wearmouth, Durham*, by virtue of a licence obtained by Mr. *Jarvis*, representing both parties as of age, though both were then in their minority. On its coming to the knowledge of Miss *Days'* father, he, from an apprehension of its irregularity, insisted on their being married again, which they accordingly were, on the 14th *June* following, at *Dalton-le-Dale, Durham*, by a second licence, obtained by the husband, in which he alone was represented as being of age, Mr. *Days* consenting on the part of his daughter, as a minor. From the circumstances in evidence, however, it appeared that Mr. *Jarvis* was not of age, as represented, at the time of the solemnization of either of the marriages, being little more than nineteen; that his father had died in *December* 1795, and, as stated incidentally by his widow, Mrs. *Jarvis*, in her evidence, *without a will*; that she had, on the 26th of *August* 1797, intermarried again with *Joseph Turner*, Esq. and was thereby deprived by law of the right of consent to her son's marriage; that no guardian of his person, with such right of consent, had been appointed by the Court of Chancery, as appeared by due search in the records of that Court.

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An objection was taken on the part of Mr. *Jarvis*, that there was not sufficient proof that his father might not have made a will, and appointed a guardian; that, though the mother, in her examination, swears that he died intestate, the letters of administration were not produced, nor was it shewn that due search had been made, in the different registries, for a will.—To which it was replied, that the evidence of the mother was sufficient; and that she might have taken letters of administration, though she had not mentioned it, as it was a circumstance which the examiner had omitted to ask her.

DAYS *v.* JARVIS.

1st *March* 1814.

JUDGMENT.

Sir *William Scott*.—This is a suit, in which it is particularly the duty of the Court to proceed with all possible caution: It has for its object to set aside two marriages between the same parties; the second of which was had for the express purpose of correcting the infirmity of the first. The parties are both young; but it does not appear whether there is any issue of the marriage, upon whom the consequences of a sentence of nullity would fall the most heavily. It was to obviate such consequences, that the Court had, in its construction of the statute, held, and not without some controversy arising in other quarters, that it is necessary to prove the negative of consent, together with the other circumstances relied on, in the strongest terms.

In the present case, the two marriages are proved by two persons present, besides the usual entry in the parish register; and the parties were afterwards received in society, in the acknowledged character of husband and wife: there is no reasonable

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sonable ground of doubt as to their identity, and there is sufficient proof of the minority of the husband. The Court, however, has a right to expect the best possible proof of every fact, tending to shew the want of legal consent: In the present instance, the father's intestacy appears only incidentally, from the evidence of the mother; — a degree of proof that the Court, in this case, thinks insufficient. It should have evidence of the nature called for, and It has a right to expect due search to be made, in the public offices of those jurisdictions, in which his will would naturally be proved, either in the registry of the Prerogative Court, or of the Diocese in which he lived. This is not what the Court ordinarily requires; but in such a case as the present, I think, It ought to have a clear and certain constat of an intestacy, and of the consequent non-appointment of a testamentary guardian, in the same manner, as a search of the records of the Court of Chancery, ascertains the non-appointment of a guardian by that Court.

A prayer was then made to the Court to rescind the conclusion of the cause, for the purpose of introducing the proof of intestacy, by search; which was granted upon the consideration, that there was ample proof of all the other necessary facts.

6th *May* 1814.

On this day, evidence was produced, that due search had been made by a competent person; by which it appeared, that no will of the deceased father of the minor had been proved, or letters of administration granted.

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Sir *William Scott.*—The Court is of opinion that this evidence supplies all the information required, and that the case is now complete. It must, however, observe, that, as the object of this suit is to set aside a marriage which was twice celebrated, with a view to give it more complete legal effect, and which has subsisted, undisturbed, for so many years since, it is not without great pain, the Court feels itself under the necessity of pronouncing this marriage null and void; which the evidence, in the cause, now renders an imperative duty.

EWING, FALSELY CALLED WHEATLEY, *v.* WHEATLEY.

6th *May* 1814.

Nullity of marriage, *by reason of fraud and alteration of licence*, not sustained.

THIS was a suit of nullity of marriage, brought by the wife against *Francis Wheatley*, of the Parish of *Saint Mary-le-bone*, *by reason of fraud and alteration of licence*, as described in the citation.

The libel was opposed by Dr. *Swabey*, who contended that the *citation*, which described the cause of nullity to be founded on fraud, was not supported by the facts pleaded in the libel.* That the

* The third article of the libel set forth, "That, in order fraudu-" lently to procure a licence, the said *Francis Wheatley* did make " an affidavit, wherein he did, falsely and fraudulently, swear and " describe himself to be an *Esquire*, of the parish of *Saint Mary-" le-bone*, aged above twenty-one years; and that he did intend " to

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the libel pleaded the marriage act, and that the marriage was had without licence *duly had and obtained*; but these were words not to be found in the act of parliament, and had not any definite sense in law that would support the conclusion of nullity, for which the Court was prayed to pronounce. It further stated, that, in order fraudulently to procure a licence, the husband took an oath that the wife was of the parish of *St. George, Hanover-Square*, when, in reality, she resided in

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" to intermarry with *Martha Ewen*, of the parish of *Saint George*, " *Hanover Square*, aged above twenty-one years; and that he " did, with a fraudulent and false intent, sign and execute the " usual bond entered into by parties on granting of marriage " licences; and that he did therein, falsely and fraudulently, de- " scribe himself and the party whom he intended to marry, as " before set forth."

The sixth article pleaded, " That the said *Francis Wheatley* is " not an Esquire, nor a person of good state and quality, but is a " person of low condition; that he has, on account of mis- " conduct, been obliged to quit the army; that he has since " been in prison, and has commonly associated with persons of " bad character, and was, at the time of the pretended marriage, " in embarrassed circumstances; that *Martha Ewing* was de- " pendent on her uncle; that he, falsely and fraudulently, repre- " sented himself to her, as belonging to a family of the first " respectability, and that he had great expectations; that he had " divers sums of money owing to him from government, and " from private persons, to a large amount; that he persuaded " her to meet him in her morning walks, and, on one of these " occasions, to consent to be married to him; that the licence " being obtained, as set forth, which he falsely represented to be " a proper licence, he informed her, that it was necessary to " make some alteration and addition to it, and, for that purpose, " went into a shop alone, where he, falsely and fraudulently, altered " the name *Ewen* to *Ewing*, and returned to her in the coach, " &c. and presented the same to the minister, and did, falsely " and fraudulently, represent to him that *Martha Ewing* was " *Martha Ewing* of *Saint George's, Hanover Square*, &c."

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St. Mary-le-bone. The only restriction, on the description of residence, was that under the 104th canon, which applied only to persons in widowhood, and was not enforced at any time as a ground of nullity. The canon itself explains what is intended, by the words "that every suit, licence, or "dispensation shall be held void, to all effects and "purposes, as if there had never been any such "granted:" by the clause immediately following, "and the parties marrying by virtue thereof, "shall be subject to the punishments, which are "appointed for clandestine marriages." The consequence of nullity did not attend clandestine marriages previous to the marriage act; and that statute expressly declares, that the residence of the party shall not be enquired into for the purpose of setting aside the marriage, after it has been celebrated. It cannot, therefore, be considered, on any ground, as a material part of the description; and no variance of that kind can be fatal to the validity of the marriage. It is further pleaded, that the licence was granted in the name of *Martha Ewen*, and afterwards altered, by the husband, to the name of *Ewing:* This objection also was immaterial, as the variation was very slight, and not proceeding from fraud or design; and it had been decided, in the cases of *Cockburn* v. *Garnault* * and *Cope* v. *Burt* †, that the mere variation of name would not vitiate a licence, where there was no doubt as to the identity, and no fraud practised in obtaining the licence in those terms. That the circumstances which were pleaded, respecting the motives and objects of

* Commissary of Surry, 4th *May* 1792. Arches, 4th *Dec.* 1793.
† Vol. i. p. 434.

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the husband, were altogether irrelevant, as the parties were both of age, and were both privy to all the acts, that were now set up as causes of nullity; that the marriage, therefore, could not be affected on any such ground.

In support of the libel, Dr. *Stoddart* and Dr. *Lushington* contended, that the charge of fraud was to be collected from all the circumstances; and that it was not material to object to the specification of fraud described in the citation, if the general character of the facts alleged were sufficient to support that charge. That they were to be taken, as proved, for the purpose of this argument; and it was to be considered, first, whether the licence was not invalid at the time when it was granted; or, secondly, whether, if originally valid, it was not vitiated by the alterations that had been made in it. Licences were special grants, which persons could not claim as of right. The canons direct * "that they should be "granted only to such persons as are of good state "and quality, and that upon good caution or security taken." And it must be the legal interpretation of such an instrument, that if not granted according to the *form* and rules prescribed, they should be null and of no effect, as was expressly declared in the 104th canon, which related to residence; that the policy of the marriage act, which had prohibited all marriages that were not celebrated by banns or licence, must be understood to imply this consequence, that if the licence is not *duly*, that is truly and *bonâ fide* obtained, on a right description of the particulars on which it pur-

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ports to be founded, it shall not be held a valid instrument to any effect; and the consequence would follow, that the marriage would be a nullity under the marriage act, being solemnized without banns or licence, in construction of law: that in the common construction of all grants, they must be understood according to the intention of the grantor; and, since the *facts* alleged sufficiently shewed, that deception and fraud had been used, both in obtaining the licence, and in the alteration afterwards made in it by the parties, it was impossible to maintain that it could be valid, either in its original form, or in the manner in which it had been used.

With respect to the former, the libel stated that the description of the wife was false, as to her name, being in the name of *Ewen* for *Ewing*, and also with respect to her parish, as she was described as of *St. George's, Hanover-Square,* though she resided in the parish of *Mary-le-bone*. It was not merely a *misnomer*, as to the spelling of the name, but substantially a false representation, both in name and parish, and must have been intended to elude the observation of the clergyman, and of others, who might have prevented the marriage. With respect to the latter, the alteration of that name also by the party, rendered it not the act of the ordinary; and a marriage so had and obtained could not be held to be celebrated under any legal authority. The general circumstances, under which this connection had been formed, were introduced to shew the real complexion of the case; as had been admitted in the case of *Pouget* v. *Tomkins* *, and it was submitted that they were strictly relevant, as tending to establish a system of artifice and deception in getting

* Supra, p. 142.

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possession of this lady, and would more strongly support the construction, which the Court would put on the falsehoods used in obtaining the licence. That it was in the power of the Court to expunge that part of the libel, if It thought it not material; but it was hoped that the Court would hold the substance of the libel to be such, as entitled it to be admitted to proof.

JUDGMENT.

Sir *William Scott*.—This is a proceeding by *Martha Ewing*, to set aside a marriage, which is not denied to have been regularly solemnized. The citation assigns the cause of nullity *to be fraud*, and the alteration of the licence. Now, undoubtedly, there may be such fraud as would vitiate the licence, and, therefore, I do not see, that there is any reason to object to the terms in which the citation has issued. It will, however, be for the Court to consider how the terms are supported, and whether the circumstances, which have been pleaded in this case, are sufficient for that purpose.

The first article of the libel pleads the marriage act, and "that all marriages had without banns "or licence are null and void." The second article goes on to allege "that the present marriage "was celebrated without banns or licence *duly* "*had and obtained*."

I do not think that there is any reasonable ground of objection to the use of the latter words, *not duly obtained*; because if they are not precisely the words used in the act of parliament, they must be understood to be necessarily implied with respect to the restrictions, which the canons impose on the grant of licences. The only conditions of the

the security required are, that there shall be no lawful impediment; that there shall be no suit of pre-contract depending, (which has been taken away by the marriage act); that the parties have obtained the necessary consent; and that the marriage shall be celebrated in the parish of one of the parties, and at canonical hours. The 104th canon requires further, in the marriage of persons in widowhood, that the residence of the parties shall be expressed; though it does not appear that this restriction was intended to be imposed on others. The statute has since declared, that the fact of residence shall not be inquired into for the purpose of invalidating the marriage; and, therefore, this marriage cannot now be impeached on any such ground. These are, however, only the preliminary articles of the libel; the admissibility of the libel itself must depend on others, without which these will be of no avail.

The third article pleads that, "in order fraudulently to procure this licence, the husband personally attended, and made an affidavit, in which he falsely swore to his own description, as *Francis Wheatley, Esquire*, being in reality not of that rank and degree; that he intended to marry *Martha Ewen*, of *St. George's, Hanover-Square*," whereas she was not resident in that parish, but in the parish of *St. Mary-le-bone*."

There are other facts in the affidavit which are not alleged to be false—as that both the parties were of age, a circumstance which is very material, the principal object of the statute being to protect minors: the place also, in which the marriage was celebrated, corresponds with that inserted in the licence, and, therefore, I do not understand what is

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meant by the averment "that *all* this was falsely "sworn." It is argued, however, that there was fraud in the false description of himself as an *esquire*, as that title belongs properly to persons of good state and quality, whereas he was a person of low condition, and assumed that description only, to assist his fraudulent object of getting possession of the lady, for the sake of her fortune.

It is certainly true, that, in the description of persons, there may be fraud, that would vitiate the licence; but the mere exaggeration of fortune or rank will not have that effect. Such circumstances may indeed be very proper to be admitted, where the main fact itself is of dubious nature, and where a reasonable doubt is entertained, whether the transaction altogether is not *substantially* fraudulent. Such was the case of *Pouget* v. *Tomkins* *, where one party was a minor, of tender years, and the other a cook-maid in his father's family, and one of his names, by which he was most commonly known, was entirely suppressed; and the publication was of one, by which he was hardly known, and the marriage was had by banns, under artifices, which were used to defeat the just exercise of the father's rights. In that case the disparity of circumstances was admitted to be pleaded, though abstractedly it would be no ground; as it might tend, in conjunction with the other facts, to elucidate the nature of the transaction, and shew whether the suppression of the true name originated in error, or in fraud. But in general, where no such consequences are to be apprehended, that a man should represent himself of superior condi-

* Vid. supra, p. 142.

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tion or expectations, will not, of itself, invalidate a marriage, as the law expects, that parties should use timely and effectual diligence in obtaining correct information on such points.

It is perfectly established, that no disparity of fortune, or mistake as to the qualities of the person, will impeach the *vinculum* of marriage; and the *mere description* is not a constituent part of the affidavit. Considering the laxity with which the title of Esquire has been used, as is the subject of remark by Sir *Thomas Smith*, in his days, as to the title of Gentleman *, and that the husband, in this case, had been an officer in the army; the Court cannot take upon itself to define, whether it has been improperly assumed, much less to pronounce, that the use of that addition to his proper name was a fraudulent act. On the other fact, that the residence of the wife was falsely described, I have already observed, that the place of abode is not a cause of invalidating a marriage, by the special provisions of the act: The directions of the 104th canon, therefore, would be immaterial, even if they were applicable to this case; but they are confined specifically to the particular case of the marriage of widows. Then what are the other circumstances which have been relied on? The circumstances, in the sixth article, may all be material, if the main facts can be shewn to support illegality; then they might be subsidiary, but they do not go farther. It appears, that the true and proper name of *Ewing* was written *Ewen* in the licence; that the man altered

* Commonw. of Eng. b.i. c. 20.

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it, as the parties were going together to Church, to the right spelling of that name. The original description was not so materially at variance with the true name, as to make the licence, in the terms in which it was granted, invalid, and unless it was invalid before this alteration, it could not be considered as fraudulent to make the alteration. In licences the identity is the material circumstance to which the Court principally looks: In banns, it is the proclamation, which is defective in the way of notice, if there is any material variance. In the present case, it is impossible to attach any fraudulent intention on this act.

It is pleaded, "that, under colour of marriage, "the man intended to get possession of the pro-"perty of the wife, and that he made his visits "clandestinely, and continued to be introduced "without the knowledge of the uncle." But the uncle had no legal rights over this young woman which could be the object of the protection of the law, nor any legal authority over her. It was left to the discretion of the parties to act as they pleased in this respect. There was a request that the connection should be kept secret: — *That* again was a matter of prudence and discretion; and if their conduct was blameable in any view, it is not a matter, that can be urged on the Court, any more than the charge that he falsely and fraudulently misrepresented his expectations. The particulars, then, that are set forth in this part of the plea, are entirely irrelevant, *viz.* "that he persuaded her to "be married privately; that, for that purpose, he "met her in her walks, and told her that it could "be done in half an hour—that he handed her into "the coach." In all this there was no force nor

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deception on her; every thing was done with her entire consent, and it appears, that she was as ready to be handed into the coach, as he was to hand her.

Two letters, written before the marriage, have been introduced, which are in the common style of real or pretended affection. Two others have also been exhibited, which were written after the marriage; these are perfectly nuptial, and being written afterwards, they could not contribute to this act. There is nothing then in these general circumstances, which have been pleaded, that reflects any additional imputation of fraud, on the manner, in which the *licence* was originally obtained. It is impossible to suppose, that any misrepresentation was made to the Surrogate, with a design of imposing upon him, or for the purpose of procuring any facility, that would not otherwise have been granted. There is no ground for any such interpretation of the motives, with which this was done. I think, therefore, that the licence is good and valid, as it was granted; and though the clergyman, if he had been aware of the variation, might properly have hesitated, yet if the marriage had been celebrated, the Court is still of opinion that the marriage would have been perfectly good.

With regard then to the alteration — Can the Court hold that the instrument was affected by what was done afterwards? The spelling of the name was changed as the parties were going to church. It must be admitted, that this was an imprudent act, as it must always be considered as treading on very tender ground to alter any instrument;

ment; but where there was perfect satisfaction as to the identity, would the clergyman have paused, in celebrating the marriage, on the licence as it before stood, or could there be any intention in this act of effecting a marriage, which would not have been otherwise obtained.

I am of opinion that there is no ground shewn, on which this marriage can be invalidated, and that the false representations of circumstances, which have been assigned, will not have that effect. They did not lead to the obtaining the licence in any manner, or to the alteration, and are wholly unconnected with it, and are of no significance whatever by themselves. The variation, in itself, is little more than a clerical error, and affords no ground on which, on any evidence of facts which is before the Court, It could pronounce this marriage void. The libel, therefore, must be rejected.

SEARLE *v.* PRICE, FALSELY CALLED SEARLE.

1 March 1816.

Suit of nullity of marriage, by reason of a former marriage, sustained.—Strict proof required of the identity of the parties.

THIS was a suit instituted by *Edward Blakemore Searle*, of the parish of *St. Peter, Cornhill*, against *Sarah*, his wife, to annul his marriage with her, on the ground of a former marriage, alleged to have taken place between her and one *Charles Price*, who was living at the time of the latter marriage.

On the part of Mrs. *Searle*, Dr. *Burnaby* and Dr. *Jenner* contended, that there was not sufficient proof * to identify the parties to the second marriage, as being the actual parties in the present cause; that the mere belief of that fact, expressed by

* On the opening of the case, the counsel for Mrs. *Searle* took an objection to the reading of the evidence of *Price*, the alleged first husband, on the ground that it was a received principle of law, that a husband and wife cannot be witnesses either for or against each other; a principle resting on the consideration, that their evidence, if in each other's favor, was open to the presumption of an undue bias, and if of an adverse character, might lead to dissensions in families, which it was the policy of the law to discourage and repress. To this it was replied, that it was not competent to the wife to take this objection, or she would thereby admit the principal fact in question, and convict herself of an act of bigamy; and that as to the evidence of the husband, it would not tend to affect any interest under his relation to his wife, or to exonerate himself from any responsibility, but rather to onerate himself with the obligations attending the character of husband.

The *Court* permitted the evidence to be read, *de bene esse*, reserving the point for more formal argument, in the event of the case appearing to depend, in any material degree, upon the evidence objected to.

by two witnesses present at the latter marriage, undeduced from any fact stated by them to warrant such a belief, was insufficient; that the admissions or acknowledgments of the party herself could not, even if more consistent with each other than they actually were, be admitted to supply that deficiency, or furnish, in any way, grounds for a sentence in a case of this nature.

On the other side, Dr. *Stoddart* and Dr. *Lushington* submitted—that the belief of identity, expressed by the two witnesses to the second marriage, was sufficiently supported by the nature of the *confrontation;* that the party was cited to be confronted as the party in the cause; that she appeared, in obedience to the mandate of the Court, in that character, and the general conduct of the suit in her name, and on her behalf, confirmed the fact. If, however, the Court should still hesitate on this point, they hoped It would, for its own satisfaction, extend to them the indulgence of rescinding the conclusion of the cause, to enable them to confront the party with other witnesses, in support of the identity.

JUDGMENT.

Sir *William Scott.*—In this case it is sufficiently established, that a *Charles Price* was married, on the 20th of *December* 1783, to a *Sarah Pollard,* and that a *Sarah Price* was married on the 28th of *February* 1811, to *Edward Blakemore Searle,* at which time the *Charles Price,* first married, was living. The only question therefore is, whether the *Sarah Pollard,* who was married to *Price,* is the *Sarah Price* who was married to *Searle;* whether, in fact, the identity, as to the second marriage,

marriage, is proved in a way satisfactory to the Court.

In all cases where a dissolution of marriage is the object of the suit, it is the especial duty of the Court, to guard against imposition: where an existing marriage is proved, it is not to be exposed to the danger of being set aside by any species of collusion; and should only be brought into question upon the most undisputed proofs. It greatly concerns the interests of families, that the marriage contract should be preserved inviolate. Experience of the world plainly shews, that married persons are often but too ready to seek a release from the nuptial chain, and too little scrupulous of the means of effecting it. For this purpose a false case might be established before the Court, whose utmost vigilance is therefore requisite, that the truth should be established, independent of the confessions of the parties. In cases of adultery, no confession of the fact can be admitted alone, and, in cases of this description, it is the more necessary to guard against the imposition of making false acknowledgments to obtain a separation. A married person may afterwards wish the marriage avoided; for this purpose a former marriage might be propounded by the one party and admitted by the other; but the Court could not rely on declarations thus made, and that too not on oath, in furtherance of the common purpose. They might go further; by substituting false parties, who might admit themselves to be parties in the cause, when they were not, and various impositions of this nature might be resorted to, to destroy the rights of the real parties. Even a decree of *confrontation* would not protect the Court in such a case, as the real

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1 March 1816.

real parties might be unknown to the officers of the Court, unknown to the practisers, and certainly unknown to the Court itself; so that, in this way, a real marriage might be set aside, without the least knowledge on the part of those interested in it. It is, therefore, a clear rule, and a rule, founded on the necessity of the case, that the identity must be proved, by other testimony than that of the parties themselves; it must be proved by witnesses, who can speak to the facts from their own personal knowledge. What could have been more easy in the present case, than for a person to have appeared to the decree of *confrontation*, and have acknowledged herself the party in the cause? It is therefore necessary, that the party should be produced to witnesses, who have known her in both characters, or to one witness, at least, who may have known her in each; why this was not done in the present case is a circumstance, perhaps, not easily explained, however much it may be lamented, on account of the inconvenience that has been occasioned by it.

The Court cannot but remark, that the result of the evidence on the present case, compared with the principles that It has thus briefly laid down, appears liable to much objection. Mr. *Phippen*, the witness to the second marriage, speaks only to his belief of the identity; on what he grounds such a belief does not appear, as he states no antecedent facts within his knowledge, from which the Court can judge of its accuracy. On the decree of confrontation, the evidence adduced is that of two witnesses, who knew the party as Mrs. *Price*, and who prove, that she then acknowledged herself to be the party in the cause; so that this part of the case rests only on that acknowledgment, and

that is insufficient. A decree of *confrontation* is an assistance to the proof, only to be applied for on special grounds, and yet this is all that has been done upon it in the present case. The other evidence, that of the admissions of the party in conversation, resolves itself into the same point, as, if the Court relies on that, It will pronounce a sentence upon the mere confession of parties.

Under these circumstances, it is impossible that the Court can come to the conclusion, that there is sufficient evidence to satisfy the strict demands of the law, in a case like the present. If any case, however, can be produced where a party, after having had the benefit of one decree of *confrontation*, has afterwards received the indulgence of another, (of the existence of which the Court much doubts) It will yield, though not without reluctance, to the application now made. If, however, no such case can be produced by the next Court day, It will then pronounce for a failure of proof, and dismiss the suit.

On a subsequent day, it was shewn to the Court that three of the former witnesses had been re-examined, with the addition of one new witness; that two of them deposed to the first marriage, and the other two to the second; that they had all had an opportunity of seeing the wife, upon the occasion of her being examined at the police office, *Queen-Square*, upon a charge of bigamy, and that they all concurred now in identifying her.

JUDG-

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JUDGMENT.

Sir *William Scott.*—The Court was certainly of opinion, at the former hearing of the cause, that there was a material defect as to the identity of the party proceeded against. The indulgence of a decree of *confrontation* had been granted, but the result was not such as the Court was entitled to expect. It was necessary that the wife should have been *confronted* with a witness who knew her in both characters, or with two or more at the same time, who could separately identify her in each.

The acknowledgment, however, by the party produced, that she was the party in the cause, seemed to have been too much relied on. Acknowledgment, indeed, is a term, in such a case, improperly applied, as it is no acknowledgment at all, unless the party is otherwise proved to be the party in the cause; and, without such proof, the acknowledgment is open to the suspicion of having been collusively made, and by another than the real party. The person, however, has now been seen by the witnesses, not indeed under a decree of *confrontation*, but under a *confrontation* otherwise effected, and the defect is supplied to the satisfaction of the Court. It is proved that the party thus *confronted*, is the person with respect to whom both the marriages are proved; the witnesses connect her with each, making a complete chain of evidence that she is one and the same person. The Court then is of opinion, that the proof is now complete in all respects, and it has no longer any hesitation in signing the sentence of nullity accordingly.

FIELDER *v.* SMITH, OTHERWISE NELSON, FALSELY CALLED FIELDER.

12th *Feb.* 1816.

Nullity, by *reason* of the want of due consent: the mother, who had given consent, being alleged to be the *natural mother.* — Evidence on that point, how considered, — not *sufficient*; party dismissed.

THIS was a suit instituted by *John Fielder* Esquire, of *St. James's Street*, against his wife, describing her as *Sophia Augusta*, otherwise *Sophia Smith*, otherwise *Nelson*, Spinster, and falsely called *Fielder*, for a nullity of his marriage with her, on the ground of her minority, and a want of legal consent.

The marriage took place on the 13th of *May* 1797, as between *John Fielder* and *Sophia Nelson*, a minor, by consent of *Mary Nelson*, widow, her mother, and in virtue of a licence obtained by Mr. *Fielder*, upon the joint affidavit of himself and Mrs. *Nelson*. It was stated, that there were twelve children, issue of the marriage; and the ground of nullity now assigned, was the minority of the wife, and that she was the illegitimate daughter of a Mrs. *Nelson*, formerly *Smith*, who, as the *natural mother*, had no right to give her consent; and that the marriage, having been solemnized, without the consent of a guardian appointed by the Court of Chancery, was void under the statute. The marriage was proved and not denied; and the birth of the minor, in *August* 1777, and her baptism soon afterwards, as the daughter of *Thomas* and *Mary Nelson*, were also proved.

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12th Feb. 1816.

JUDGMENT.

Sir *William Scott.*—This is a suit to dissolve a marriage, which has taken place above twenty years ago, and, as far as appears from the family history of the parties, has subsisted ever since without any attempt at interruption. It is a marriage, perfectly regular in form, had with the consent of the mother, the only person, *primâ facie*, appearing to have the right of consent; and, at this distance of time, the Court is called upon to declare the marriage void, upon a principle of law, that such a consent is not the consent of an authorized person.

It has been held, both here and in the Court of King's Bench, that the consent of the parents of illegitimate children, is not a consent within the meaning of the act. This has been matter of doubt; and it is perhaps a point not yet finally settled, as a case, raised upon it, is said to be now in progress, for the decision of the last court of resort.* In the present case, all persons interested concurred in the marriage, and it is now sought to be invalidated, upon this strict principle of law, the growth of latter times. It is hardly necessary to observe, that the feeling of the Court, as far as it can be properly indulged, is strong in favour of the marriage; and the evidence must be of a very peremptory nature, that should induce the Court to pronounce such a marriage null and void.

The first and great question respects the marriage of the parents, since it is objected, that the mother

* This is understood to have applied to the case of *Priestly* v. *Hughes*, (vid. vol. i. p. 360.): but, it is believed, nothing further was done upon it.

 could

could not legally give consent, not being the lawful wife of the father; and the Court is now expected to pronounce on the marriage of persons, one of whom has long since been dead; and that those parties, while living together, were living in unlawful cohabitation. Surely this would require the strongest attainable evidence to be produced. That they were living together without marriage is asserted upon two grounds; first, the reputation of that fact, and, secondly, that *Nelson* had a wife living at the time.

It is certain, that the illegitimacy of a child may be proved by *probable* evidence, perhaps by reputation only; but then the reputation must be clear and undoubted,—it must be uniform; for if a reputation has existed both ways, the conclusion would be in favour of the marriage. Here the reputation is contradictory; a cohabitation for many years is proved, children were born, and the parties constantly passed for man and wife. There were, it is true, some persons that had their suspicions; but the general impression appears to have been, in favour of the connection being legitimate. Three witnesses only are produced on the point of reputation. Mr. *Watts*, an upholsterer, deposes, "that "he furnished a house for Mr. *Nelson*, upon his "marriage with one *Mary Kelly*; that the mar-"riage took place in *April* 1771; that he, the de-"ponent, was not present at the marriage, but "he remembers their going out to be married; "that, on their return, they both acknowledged "that they were married, and he dined with "them upon the occasion; that they lived toge-"ther two or three years, but then disagreed, and "parted; that he, the deponent, was trustee for

 "Mrs.

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" Mrs. *Nelson;* that he believes that she died
" about the year 1792, but knows that she was
" alive many years after the year 1788; that in
" 1774 Mr. *Nelson* removed into a street opposite
" to the *Pantheon,* in *Oxford Street,* from thence to
" *Gerrard Street, Soho,* where he kept the *Royal*
" *Larder,* and lastly to *Drury Lane,* in 1776, at
" all which places he kept a gaming-house, &c.;
" that whilst he lived in *Gerrard Street,* he went,
" one evening, with deponent, to *Bagnigge Wells;*
" that they there met with two young women, one
" of whom, *Mary Smith,* from that time, lived
" with Mr. *Nelson* as his wife; that they had four
" children, to one of which he, the deponent,
" stood godfather; that he believes it was *Sophia*
" *Augusta,* and that she was born in 1777; that
" he often saw her during her infancy, and latterly
" at the house of her mother, in *Pall Mall,* as
" Mrs. *Fielder.*"

It is to be remarked, upon the degree of credit due to this man's testimony, that though he deposes against the existence of any marriage, he had himself attested the legitimacy of the child, by a solemn act in the house of God — that of being godfather to her, as "the daughter of *Thomas* "and *Mary Nelson.*" Considering, therefore, the habits of this man's life, as disclosed by himself, in his deposition, and the slight and contradictory nature of his evidence, he is not much to be relied on.

The next witness is *Ellison,* who deposes "that "the parties were not married, though passing as "husband and wife,"— he gives, as his only reason, his belief "that the former wife, *Mary Kelly,* was "alive at the time; that he remembered the day

" of

" of the marriage with *Mary Kelly*, as he called " to wish them joy, and had cake and wine." The law is, at all times, very unwilling to admit evidence to bastardize children; but here the balance of evidence is the other way. The minor was baptized as legitimate; her mother has stated, that she was improperly described by the name of *Smith*, and has sworn to her legitimacy to obtain the licence, and asserted it by giving her consent to the marriage, though she has not thought fit to enter into that subject, in her deposition. She had an undoubted right to decline doing so, if she thought proper, as the *onus probandi* was upon the party prosecuting the suit; and he is not entitled to the assistance of any proof, which the law would not be disposed to enforce for him.

Upon the fair result of this evidence, then, if reputation alone could be admitted, to establish the fact of an illicit intercourse, there is an insufficiency for the purpose. As to the other ground, that of the former wife being living, at the time, when this child was born, it rests solely upon the evidence of the two witnesses alluded to, unsupported by any documentary proof. No register is produced, nor any person who can swear to their being present at the marriage. The mere fact of the parties going out, by themselves, with the avowed intention of being married, resting, as it does, only on the evidence of *Watts*, whose credibility has been already remarked upon, of itself proves nothing; as, from the character and habits of life of *Nelson*, it is not improbable that this might be a simulated transaction; he might have designed it as a cloak to an illicit connection, without any marriage really passing. Neither is the fact, stated

 by

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by the same witness, of his being a trustee of the wife, any proof of the marriage, as his trusteeship might have been under the separation. There is also no proof, that she did not die before the second reputed marriage; for though it is in the deposition of *Watts*, that she was alive after the year 1788, yet no grounds are stated for that opinion. The other witness states nothing more than his calling to wish them joy—a fact which is open to similar observations; and if a marriage really had passed, it might easily have been traced, and there is no doubt, that it would have been proved more decidedly. The evidence to the contrary is, therefore, too slight to operate to the dissolution of a marriage, sufficiently proved and admitted; had with the consent of the mother; and, in every other respect, perfectly regular.

Upon the whole of this case, the Court is of opinion, that there is such an imperfection in the evidence, as ought, under the circumstances of the case, to be considered sufficient to destroy the claim of the party proceeding to a sentence of nullity. It therefore pronounces for a failure of proof, and dismisses the wife from the suit.

BRISCO *v.* BRISCO.

1st *March* 1816.

Alimony, pending suit of divorce, proportion, according to circumstances, £200 given in addition to separate income.

THIS was a question as to the alimony to be allowed to Lady *Brisco*, during the dependance of a suit, instituted by her against her husband, Sir *Wastel Brisco*, for a divorce, on a charge of cruelty and adultery.

JUDGMENT.

Sir *William Scott*.—This suit, originally began as a suit, brought by Lady *Brisco*, for cruelty and adultery, against Sir *Wastel Brisco*; but it has now assumed the shape of recrimination, by a charge of adultery against her. The allegation of faculties, as it is technically called, was givon in, as the first step in a question of alimony, early in the year 1814. It is always desirable, that an allegation of this nature should be given at an early period; and that the question of alimony should be disposed of, in the first stage of the proceedings, to prevent the husband being unnecessarily harassed, with suits and demands for his wife's debts. After the admission of the allegation, some objections had been taken to the answers of Sir *Wastel Brisco*, one of which objections, "the want of a sufficient specification of the value of an house, and some demesne lands, occupied by himself," was held sufficient for the Court to require further answers upon those points. It appears, that he thought, that, as this house and domain, or park, were occupied by himself, as they had been also by his ancestors, they should not be charged; a mistake, which might easily occur; for it does not usually happen, that Gentlemen appreciate their mansion-house and demesnes, as if they were to be let. It was not improper, therefore, in him to

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take time to consider upon the terms of his answers, (which he gave in by the end of that year), before he inserted the exact specification of the value of this part of his property.

Now, undoubtedly, though it is usual for the party to accept the answers, particularly when reformed by order of the Court, the wife is not compelled to acquiesce in the valuation of her husband, and it is open to her to examine witnesses, if she thinks proper: this, however, is a right not to be exercised wantonly, but with great caution and tenderness. It is hardly ever necessary, in cases of considerable property, to enter into an inquisitorial scrutiny of its exact value: it is to be taken upon a fair general estimate. Here, however, Lady *Brisco* charged the value of a particular property at £2000 *per annum*, which Sir *Wastel* set at £350. So great a difference as this induced the Court to go into the inquiry: upon the result of which it now turns out, that Lady *Brisco*'s valuation is enormous, and unfounded in the extreme; and that even Sir *Wastel*'s is above the real value. This is a misrepresentation, which the Court must consider to have been imposed upon the party herself; as It is unwilling to suppose, that she designed such an imposition upon the Court. By what witnesses is this valuation supported? by two only, who have been in open hostility to Sir *Wastel Brisco*, persecuting him with law-suits, and indicting his steward for perjury, but prevented by the grand jury indignantly rejecting the bill. The testimony of such witnesses is of a piece with the allegation, upon which they were examined, and is utterly undeserving of credit.

Taking

Taking the whole of Sir *Wastel Brisco*'s income, upon the fairest calculation warranted by the proof, the Court is of opinion that, taken altogether, it may be considered to be £2,600 *per annum;* subject, however, to an immense depreciation, from the present state of landed property; the extent of which cannot be foreseen, no man knowing what he shall receive; some farms being let at rents reduced 25 *per cent.*, others paying no rent at all, and others thrown up altogether. It has been said, that all this might be temporary; so may the continuance of the present suit; but the one appears, at present, as improbable as the other. Supposing every thing had been clear, in the case, the Court might have been inclined, perhaps, to allow one-fifth of the whole property to the complainant, including her pin-money. This would be quite as much as is necessary for her suitable maintenance, in a situation calling, as her's does, for retirement and prudence; and in which she must be expected to have some little regard, for the interests of her husband and her family. He has to maintain the expences of the suit, which have been carried to an extent, of which the Court hopes never to see such another instance; and, as a country Gentleman, living in his own county, he has to support the dignity kept up by his ancestors, and has also to maintain his three children.

These would have been considerations, which would have had great influence with the Court, even if there had been no misconduct on the part of the lady; but she has launched out into expenditures to an astonishing amount, with no necessity to justify them. There appears to have been orders given to tradesmen for plate, clothes, linen,

china,

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china, horses, and carriage, &c. with no communication with the unfortunate husband, who was to pay for them, and whilst litigation was going on, which prevented the Court from proceeding in the allotment of alimony. It has been said, that this was done to replace the clothes burnt by her husband; it is admitted, that he did burn some, and he assigns as a reason "that he burnt them to induce her to "write for some more from the place, where she "had left them," an extraordinary reason, and certainly a most unfortunate expedient. The carriage too, and plate, if ordered on the authority of her father, should have been at his expence, so as to secure her husband from the payment; but the bills are sent to him. The father dies, and it does not appear, that his executors have ever been applied to, on the subject. It has now been said, that Lady *Brisco* is ready to give up the articles in her own possession. This will be but a secondary satisfaction if made; there is, however, nothing to prevent her converting them into money for herself, if she is so minded. Under all these circumstances, where enormous expences are thrown upon the husband, in every mode, to which female extravagance can apply itself, if the Court did not feel that by ordering alimony, It was most consulting the protection of the husband, It would hardly be disposed to allot any alimony at all. Under all considerations, however, the Court allots the sum of £200 *per annum*, in addition to the sum of £200 *per annum* pin-money.*

* Affirmed on this point, in proceedings in the Court of Arches, 20th *May* 1819; and in the Court of Delegates, 15th *Feb.* 1820.

WILSON *v.* WILSON.

16th *March* 1797.*

Costs of the wife, having a sufficient independent income, not allowed to be taxed, against the husband, during the proceedings.

THIS was a suit of divorce by reason of adultery, brought by the husband, in which application was made on the part of the wife, that she might be allowed to have her costs paid, as incurred, during the suit.

In support of this prayer, it was said, that the husband had dissipated a considerable fortune, which the wife had brought; and still retained £2,000, for which he paid no interest; that there was no instance, in which the wife had been refused her costs, in a suit instituted against her.

On the other side, it was contended, that costs and alimony stood on the same principle — the presumption that the wife had no separate income; and both claims had been denied on the same grounds. The cases of *Furst* v. *Furst*, Consist. 1739, and *Holmes v. Holmes*, Arches 1755, and *Davis* v. *Davis*, 1789, were cited, by which this point had been determined In the present case, the wife had a separate income of £440, and the husband £400; that if it could be considered as one income, the Court would not, for alimony, grant a moiety to the wife. It would not therefore deduct from the income of the husband, in order to spare an equal income, which the wife now actually possessed.

* A report of this case has been obtained and inserted, though out of its order of date, as connected with the subject of the preceding case, and referring to former authority.—*Vide infra*, Davis *v.* Davis, page 204.

JUDG-

WILSON *v.* WILSON.

16th *Mar.* 1797.

JUDGMENT.

Sir *William Scott.* — In suits instituted either by the husband or the wife, (for I consider that fact to be indifferent,) the wife is a privileged suitor as to costs and alimony; and on the same principle, that the whole property is supposed, by law, to be in the husband. If the wife therefore is under the necessity of living apart, it is also necessary, that she should be subsisted, during the pendency of the suit; and that she should be enabled to procure justice, by being provided with the means of defence. This arises out of the ordinary condition of connubial society, and the state of the property, between the parties, as usually vested, under the more ancient law of the kingdom.

If it should happen, as by the introduction of other principles, and operation of law, it often may that the wife has an income correspondent to her own expences, and the necessary expences of the suit, (for both must appear,) there is no longer the same reason, that she should be a privileged suitor. It may turn out that, on the result of the proceedings, she may be still entitled to her costs; but, by a variety of cases — particularly the last of those mentioned*, in which I was of counsel, it has been

* The case of *Davis* v. *Davis*, Arches, 1789, was the subject of much discussion, on the principle, and on the authority of former practice, and was argued at length by Dr. *Compton* and Dr. *Scott*, on the part of the wife, and by Dr. *Harris* and Dr. *Bever*, on the part of the husband.

JUDGMENT.—Sir *W. Wynne.*—This is a suit for separation, by reason of cruelty and adultery, brought by the wife against the husband. An appearance has been given on the part of the husband, and a libel and issue, confessing the marriage, but otherwise contesting

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16th *Mar.* 1797.

been decided, that where there is an independent income, competent to the support of the wife, and the maintenance of the suit, the privilege is no longer considered to continue. In the present income of the parties there is almost an equality, and the Court will not look back to what may have been dissipated; observing only, that what has been dissipated, in the present case, appears to have been so

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testing the said negatively. The cause then is come to that stage where, in ordinary cases, the proctor for the wife usually prays costs. The general rule is admitted, that, in all cases, the wife's proctor is at liberty, at this period, to porrect his bill, and pray it to be taxed against the husband; but it is stated, that the present case ought to be an exception to that rule. It is alleged in the act of court, that she had, at the marriage, £160 a year, which was secured to her separate use, and of which she is now possessed — that he is a clergyman unbeneficed, having no cure or faculties, to enable him to pay her costs; and that, under such special circumstances, the general rule ought not to prevail. It has been argued, that it is laid down, as a rule without exception, (save as to the case of a pauper, who sues as such), that, let the faculties of the husband be what they may, the proctor of the woman may porrect his bill of costs *de die in diem*, and the Court will decree payment.

It is admitted, that the principle, on which the rule is founded, is, that under the ancient law of the country, the wife is presumed to have no separate fortune, and that by marriage every thing becomes the property of the husband; yet it has been said, that although facts may be established to rebut the presumption; although the husband could prove the law of the country inverted — yet that costs must still be given, the rule admitting of no exception. If it were so, I should feel myself much inclined to depart from such absurdity; but I am not under those difficulties. There are instances occurring to my relief, where the contrary doctrine has been laid down; the first case is *Holmes* v. *Holmes*, heard in the Arches, 3d *Feb.* 1755, on an appeal from the Consistory Court of *London*. It was, in the first instance, a suit for restitution of conjugal rights; — in the Arches, the wife's proctor porrected his bill, praying costs to be taxed in

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16th Mar. 1797.

so dissipated not without the assistance of the wife. Looking at the fact, that she has £440, with a prospect of increase, for herself alone, the husband only £400 for himself and family, I am of opinion, that it would be injurious to the husband to make any such allowance; and that there is no reason for it; and, therefore, I reject the application of the wife.

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in both courts; the husband objected thereto, stated that he was a bankrupt, and worth nothing, and that she had £300 a year, and a considerable personal estate in trust for her separate use. She set forth in affidavit that he had in the marriage deceived her, that he had defrauded her, and a commission of bankruptcy had issued against him at the suit of her trustees; and she admitted, that she had £2,000 in money, £500 in plate, but not more than sufficient for her decent maintenance. The Judge said, " that it was a rule, that the husband should pay costs on " whichever side the suit began, but that it was founded on the " presumption, that he had every thing, and the wife nothing; " that where the contrary appeared, the law and presump- " tion were done away;" and he cited a case, *Pierce* v. *Pierce*, before Dr. *Edmunds*, Chancellor of *London*; in which, on petition for alimony and costs, it appeared that the wife had £200 a year to her own use, the husband was a gentleman-pensioner of £100 a year salary, had children, and was much in debt. The Court gave neither alimony or costs — the wife appealed to the Arches — Dr. *Bettesworth*, the dean, on the notion in Dr. *Scott*'s argument, allowed costs, but not alimony. From thence, the husband appealed to the Delegates, where the first sentence was affirmed.

These cases completely shew, that where the foundation of the rule is taken away, the rule will fail. In both it was adjudged, that neither costs or alimony were due; I have only to consider, therefore, what are the facts in the present case. The wife admits she has £160 a year, which she enjoys; the husband has sworn, that he can only do occasional duty as a clergyman, is prevented frequently from that by illness, and has no income or property whatever. No situation can be more distressed; and I think, if I can do it, that I ought to reject the prayer of the wife's proctor. I am of opinion, that the cases I have before stated, will warrant me in so doing, and I reject such prayer accordingly.

MEDDOWCROFT *v.* GREGORY, FALSELY CALLING HERSELF MEDDOWCROFT.

12th *July* 1816.

Nullity of marriage, by banns, by reason of minority and want of consent of the father. On the suit of the father,s ustained.—Vide facts.

THIS was a suit of nullity of marriage, instituted by the father of the husband, on his own behalf, by reason of minority and undue publication of banns. The libel also pleaded that the marriage had been contracted clandestinely and *fraudulently.**

On the part of the father, Dr. *Swabey* and Dr. *Lushington* contended, that it was not necessary to shew actual deceit, if the publication was such as

* It appeared that Mr. *W. Meddowcroft*, the minor, had been brought up and educated by his uncle, Mr. *J. Meddowcroft*, a solicitor in *Gray's Inn.* On completing his education, he was received into his uncle's office, and articled to him in his profession of a solicitor. Whilst serving his clerkship, and when about the age of eighteen, he was placed as a boarder in the house of a Miss *Lewis* of *Devonshire Street, Queen Square*, where he became acquainted with the lady proceeded against in the present suit, Mrs. *Mary Gregory*, a widow, about the age of thirty. An attachment took place between them, which ultimately led to the marriage in question, on the 28th of *February* 1815.

Mr. *J. Meddowcroft*, the uncle, proved, that about *April* or *May* 1814, his nephew first disclosed to him his attachment, by letter, and requested his consent to the marriage. He, in reply, told him that he was not of an age to talk on such a subject, and threatened to turn him out of doors if he persisted in the idea. He also went to Miss *Lewis's*, to make inquiries on the subject; upon which occasion, Mrs. *Gregory* introduced herself to him, and apprized him that his nephew had hopes of ultimately obtaining his consent; but he then positively expressed his dissent, and assured her that their mutual ruin would be the inevitable consequence of such a match, as he should turn his nephew

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as was adapted to deceive; and that publication would be vitiated by any variation that tended to conceal the identity of the parties; that the difference in this case was material, and such as fully produced the effect of concealment. Some illustrations were referred to, of what might or might not be material variations; and reference was made to the case of *Mather* v. *Neigh* *, in which a publication in the name of *Wright* instead of *Neigh* was held false.

On the other side, Dr. *Jenner* and Dr. *Dodson* contended, that the Court would be tender of annulling

nephew out of doors, and discard him for ever. He repeated these assurances to her upon several subsequent occasions, until she signified to him, that, as he was so positive in his determination, she had given up the matter, and should think no more of it. He afterwards removed his nephew to lodgings in *Cook's Court, Carey-Street*, and remained in entire ignorance of the marriage until informed of it by a friend, about *November* 1815. He made various inquiries, and also endeavoured to ascertain the fact from his nephew, but without success; until, in *January* 1816, Mrs. *Gregory* called upon him, in *Gray's Inn*, and confirmed the fact, stating the particulars; upon which he animadverted with some warmth on her conduct, and threatened to prosecute her for a conspiracy. He then repaired to the parish church of *St. James, Clerkenwell*, where the marriage took place, and inspected the marriage-register, the entry in which was made in the right names of the parties. He examined likewise a book kept by the parish-clerk at his own house, in which he entered the names of parties, on application being made to him for the publication of banns, and found the entry to have been as between "*William Widowcroft*, a bachelor, and *Mary Gregory* "widow." The parish-clerk informed him, that the names were copied from this book into the regular banns book for publication; and, on inspecting the entry there, it appeared to have

* Consist. 10th *July* 1807.

been

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nulling contracts actually solemnized, unless under such circumstances as were clearly in breach of the provisions of the act. The construction, which had hitherto been put on the act, was admitted to be sound; but the Court would not extend the restrictions further, than was necessary to afford adequate protection to the rights, to be secured by the marriage act. In a case, where fraud was pleaded in direct terms, it was a material failure of proof, that no evidence had been offered to that effect. There was no act that bore such an aspect. The uncle had been apprized of the intention; and if he had heard the publication in the form in which it

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been altered from "*Widowcroft*" to *Meddowcroft*, partly in ink of a different colour to that of the original writing, and partly by an erasure with a knife.

Mrs. *Ann Alexander*, a boarder in Miss *Lewis*'s house at the time Mr. *W. Meddowcroft* and Mrs. *Gregory* were there, deposed to her impression of Mrs. *Gregory*'s endeavouring, by her constant attentions, to attach Mr. *Meddowcroft* to her. Mrs. *Alexander* took upon herself to express her opinion of the impropriety of this conduct, and the probable uneasiness that would ensue from it to Mrs. *Gregory*, but without effect.

Upon the latter removing from Mrs. *Lewis*'s, she took private lodgings in the same street, where she was visited by Mrs. *Alexander*, whom, in *February* 1815, she informed of the intended marriage, observing that it was to be clandestine, and, above all, to be kept from the knowledge of Mr. *Meddowcroft*'s uncle, and that she had sent the banns for publication. Mrs. *Alexander* was then invited, and consented to be present at the marriage; and, accordingly, she was so, no other person being present, except the parish-clerk, who gave the bride away. When they were about to sign the marriage entry, the mistake of the name in the banns-book was discovered, and altered by the minister or clerk from "*Widowcroft*" to *Meddowcroft*.

Mrs. *Elizabeth Bradley*, in whose house Mrs. *Gregory* took lodgings on removing from Miss *Lewis*'s, confirmed the clandestine courtship, and proved that Mrs. *Gregory* applied to her to get

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it was made, he could not have been deceived. The father was at a distance from *London*, and there could be no object to alter the name on his account. The names were rightly delivered; and it was owing to the mistake of the daughter of the clerk, that they were wrongly taken down.

There may have been cases where fraud has been practised, or a name assumed, to which the party was, in no manner, entitled, which, of course, would not bear upon this case. The distinction is laid down in the cases of The King v. Inhabitants of *Billinghurst* *, and The King *v.* Inhabitants of *Burton-on-Trent* †, in which the marriages were

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get the banns put up. She asked why they could not wait until Mr. *Meddowcroft* was of age? but was informed by Mrs. *Gregory*, that it was intended to keep the marriage a secret, especially from Mr. *Meddowcroft*'s uncle, if possible; and she then inquired what church she would recommend to have the banns put up at. After mentioning several, Mrs. *Bradley* suggested *Clerkenwell* church, as being as little likely as any for them to be known at by the publication; to which Mrs. *Gregory* assented, and then wrote the names and necessary instructions on a slip of paper, which Mrs. *Bradley*, without reading, took to the parish-clerk's house, and delivered to his daughter, who entered them in his book. Mr. *Penny*, the parish-clerk, confirmed what he had stated to Mr. *Meddowcroft*, respecting the transcribing of the names from his book into the banns-book; and proved, from the three marks drawn across the names, that they had been published three times in the name "*Widowcroft*," as it originally stood. He further stated, that it is always his custom in marriages by banns to ask the parties, before the entry is signed, whether their names are spelt right in the banns book; and upon doing so in the present instance, the mistake of the names was discovered; but the clergyman treating it as a thing of no consequence, the clerk made the alteration. The minority and non-consent were fully proved by several of Mr. *Meddowcroft*'s relations.

* 3 *Maule & Selwyn*, p. 250. *Vid.* cases there cited.

† *Ib.* p. 537.

held

BURGESS *v.* BURGESS.

10th *July* 1817.

Divorce, by reason of adultery; Proof,—confession of the particeps criminis, as connected with the act of the wife, admitted.

THIS was a cause of restitution of conjugal rights, instituted by Mrs. *Burgess*, in which an allegation was given, on the part of Mr. *Burgess*, pleading the adultery of the wife, and praying divorce on that ground.

JUDGMENT.

Sir *William Scott.* — This suit commenced by a citation on the part of the wife. The prayer of Mrs. *Burgess* is met by an allegation on the part of the husband, pleading facts of adultery, and, on that ground, praying the legal remedy of divorce. A responsive allegation has been given in by the wife: witnesses have been examined on both pleas; and, upon their evidence, the case now comes on for hearing.

It is proper that I should consider, in the first place, the proofs of the charge against the wife; because if that is sufficiently proved, it will exclude her prayer for a restitution of conjugal rights; and if it is not proved, it will exclude his prayer for a divorce, and he will still lie under the necessity of cohabitation with her.

The marriage is admitted and proved on both sides; it took place at *Lambeth* in the month of *August* 1802, and the parties lived together from that time until *January* 1812, and had several children. It appears, that Mr. *Lane*, a young gentleman, was introduced into this family about the latter end of the year 1813, or beginning of 1814; that

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that until that time the husband and wife had lived in a sufficient degree of amity. He was an affectionate husband, and fond of seeing his wife admired; and she met his affection with no return of unkindness on her part; their harmony was uninterrupted, notwithstanding differences which had occurred with respect to the settlement of some family property; and it does not appear to have been affected by any waywardness of disposition on her part. There was no ground to complain of any want of attachment on the part of the husband: If any thing was to be observed, he might be said to have entertained a blind confidence in her, unsuspicious of those consequences, which might have been anticipated by a man of greater caution. In short, nothing materially affected their domestic peace, until Mr. *Lane* was introduced into the family; caressed and courted by the husband, and unhappily by the wife also, if the facts charged are true.

In *September* 1814, Mr. and Mrs. *Burgess*, with their two children, went on a visit to the Reverend Mr. *Lloyd*, a friend of theirs, at his living, in *Northamptonshire*. Mr. *Lane* accompanied them. The visit appears to have lasted about a fortnight, and, during that time, Mrs. *Burgess*'s conduct to Mr. *Lane* attracted Mr. *Lloyd*'s observation: he says, "that he observed Mr. *Lane* was very attentive to "her, and that she appeared desirous of attracting "and engrossing his attention; that she was "always desirous of sitting next to him at table, "and on various other occasions, either in the "carriage or on the barouche box; but that he "never saw any thing in her conduct that approached to indecent familiarity, nor were any "liberties taken in his presence, but she showed a "par-

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held good; and, in the present case, the Court cannot consider the variation to have been such, as will affect the validity of the marriage.

In reply, it was said, that it was not necessary to prove the fraud in a specific manner; that it was enough if there was actual concealment. If the clergyman had made the mistake, and there had been the *animus publicandi*, it might have been a different case; but it was clear, that there was an intention to conceal; for the name was entered wrongly also in another particular, as it had stood originally *Widowcroft*, and was altered to *Wedowcroft*.

JUDGMENT.

Sir *William Scott*.—This is a proceeding of the father, to dissolve a marriage of his son, on the ground, that it was had without his consent; the son being a minor, and the marriage being had without publication of banns. The Act requires, if not in words, yet in fact and reasonable construction, that the publication should be regularly made *in the true names*. It appears, in the present case, that the young man had two uncles resident in *London*, who watched over him with parental regard, put him to school, and afterwards placed him with a solicitor, and sent him to lodge at the house of a Mrs. *Lewis*, where Mrs. *Gregory* was also a lodger. An attachment took place, though under a very considerable disparity of age, he being a minor, and she above thirty. Whether there was any other disparity, in their circumstances, or whether the young man had any provision, which was likely to have been an object, in procuring this marriage, does not appear. It is

clear,

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clear, however, that the difference of age alone rendered it a very imprudent connexion for a young man, who was then in the course of his education. It was so considered by one of his uncles, who, on being informed of the intention, expressed his entire disapprobation, both to his nephew, and to the lady. The young man was withdrawn to another house, for the purpose of breaking off the connexion, though without effect. The intimacy was continued—and they were married—and it was not till some months afterwards, that the uncle heard of it, when he was very angry.

The facts appear to be shortly these:—that Mrs. *Alexander* was the only person to whom it was communicated, with a request that she would attend, with which she complied. Another woman, who kept a perfumer's shop, by the name of *Bradley*, was employed to carry notice of the banns to *St. John's, Clerkenwell*; and it appears, that on consultation with the friends of the wife, it was thought right, that the banns should be published, where there might be the least chance of the young man's relations hearing of them. There is, in this, undoubted concealment: a consultation to choose an obscure church, where there was little likelihood, that the publication would come to the knowledge of his friends—the very effect which it is the object and the policy of the Act to prevent. Mrs. *Bradley* took the notice of the names, in the handwriting of Mrs. *Gregory*, to the clerk, but he was not at home. The Court cannot refrain from observing, on this statement, how very loosely a matter of such importance is conducted, in this town. The notice was received by his daughter, entered in a private book, and afterwards transplanted

planted into the regular banns-book, being written in the first *Widowcroft*, in the second *Wedowcroft*. At the marriage, it appears they were, for the first time, altered to the right names, the publication having been in the name of *Wedowcroft*, instead of *Meddowcroft*.

It has been contended, that where no fraud is practised, though the names may be so distorted, as to be quite different, it will not vitiate the marriage; but no authority has been cited for that position. Mrs. *Bradley*, who delivered the notice, knew nothing but "that they were given by Mrs. *Gregory* on a slip of paper," and she did nothing more than convey them. I must take it, therefore, I think, that the clerk's daughter received the names as they were actually sent, and intended to be published.

The first question is then, whether there was any fraud designed? and it is said, none; because the parish was one where his friends were not likely to attend. When, however, all is done, that could be done, to conceal the publication, but so as not to invalidate the marriage, according to the expectation of the parties, it has no weight, to repel the imputation of fraud, that it was in a distant church. It is said, that the alteration would have been more material, if fraud had been intended; but I am of opinion, that the alteration is, in itself, material, as it varies the substance of the name; and being in the *initials* of the name, it is more conspicuous and effectual, than a variation of the same extent merely in the body of it. It is only in late times, that great exactness has been used, in spelling the names of families, which

 were

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were formerly written in many different ways; and there may be cases, in which it might be reasonable, that an allowance should be made for errors of that kind. But I am of opinion, that this alteration is so material, that it was likely to deceive, and intended so to do. The uncle, indeed, who had an intimation of the designs of the parties, might not have been deceived; but friends, who were not acquainted with the clandestine intention, might naturally be imposed upon by this alteration. The Court cannot doubt, that it was intended to elude the vigilance of parental authority.

It is proved to have been the object of the parties, to effect a clandestine marriage; and this cannot be considered otherwise, than as an auxiliary circumstance, and as part of the concerted plan. The husband appears not to have been conusant of this particular fact, since he discovered the variation at the marriage, and desired, that it might be set right, and it was accordingly corrected.

On the whole of these circumstances, I have no hesitation in pronouncing this to have been a fraudulent publication, and effected for fraudulent purposes; and that the name was altered to elude the knowledge of the father. I must, therefore, declare this marriage to be null and void, under the provisions of the Statute.

WYATT, FALSELY CALLED HENRY, *v.* HENRY.

20th *June* 1817.

Nullity of marriage, by a publication of banns in a false name, sustained.—Nature of proof required as to *identity*.

THIS was a proceeding at the instance of *Charlotte Wyatt* otherwise *Henry*, and wife of *Thomas*, otherwise *Charles Henry*, of *Ealing*, *Middlesex*, against him, to annul a marriage which had been solemnized between them, on the ground of an undue publication of banns.

When the cause was about to be opened, Sir *William Scott* observed, " This being a suit undefended by any counsel, on the part of the party proceeded against, is a circumstance greatly to excite the vigilance of the Court; and I here remark, that it is the determination of the Court never to hear any causes of nullity of marriage, unless they are defended by counsel. In cases of such importance, as those involving the dissolution of the marriage contract, and where the absence of all defence tends to the presumption of collusion, it is too much to expect, that the Court should take upon itself the responsibility of sustaining, exclusively, the cause of the defending party. The Court has, however, read the libel and evidence very attentively, and will point out to the counsel for the complaining party, those parts of the case to which It will require them, particularly, to address their attention, leaving it to their discretion to advert to such other parts, as they may think proper."

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The libel states, "that *Thomas Henry*, the "party proceeded against, was the natural and "lawful son of *Thomas* and *Marcella Henry*, and "was born on or about the 21st of *May* 1789, in "the village of *Rathsan*, in the parish of *Kilvarnet*, "in the diocese of *Killala*, and county of *Sligo*, *Ireland*; that search had been made in the registers of "that and the neighbouring parishes, but no entry "of his birth or baptism could be found; that "his parents being *Roman* Catholics, he was baptised privately at home, by a priest of that persuasion; that they had five children besides, "who were baptised in a similar manner; that "*Miles Henry*, the uncle of *Thomas*, and who "was an apothecary in *Ireland*, having taken the "two elder children into his shop, and ultimately "provided for them, in 1802 took *Thomas Henry* "as his assistant, and sent him at the same time "to a school in the neighbourhood; that upon his "uncle's death in 1804, he went into the employ "of a gentleman, who was apothecary to the "Royal Hospital at *Kilmainham*, in *Dublin*, and "afterwards returned, and went into practice for "himself at *Sligo*, where, on the 5th of *February* "1808, he married one *Eliza Robinson*, according "to the ceremonies of the *Roman* Catholic church, "but soon afterwards deserted her, and came to "*England*, and that, during all this time, he "passed and was married by his proper name of "*Thomas* only."

All this private history of the party is fully established; but the libel then goes on to plead, "that "on the 1st of *July* 1812, *Thomas Henry* was "married to the complainant, *Charlotte Wyatt*, at "the

"the parish church of *Christ Church, Surry*, "under the assumed name of *Charles Henry*, and in virtue of a publication of banns in that "name."

The first point, therefore, to be proved is, that the *Thomas Henry*, to whom all these occurrences in *Ireland* apply, is the *Charles Henry* who was married at *Christ Church*—the contrary being the inference that results from the diversity of the names; for, unless this point is established, all the *Irish* history goes for nothing. If this was established, the next proposition to be made out would be, that the name of *Charles* had not been subsequently acquired; that, not being a baptismal name, it also was not adopted or used in common parlance; and that the former continued to be his only proper name, and the only one in general use. If this proposition should be made out, it would still remain to be shewn, that the marriage was an act of fraud committed on the complaining party, and that she was not an equal participator with him in the fraud of the transaction.

Now, there is a total blank in the evidence as to the name or connections in life of this *Thomas Henry*, from the time he quitted *Ireland* in 1810 until the marriage in *July* 1812. It does not appear by what name he passed, or was known, during that interval, except from his own admission. It is pleaded, "that, in the *November* following the marriage, he was taken into custody, "and examined at *Bow Street*, on a charge of "bigamy, and that he then admitted his real name "was *Henry*." Admissions of parties, however, in cases of this description, are open to great suspicion,

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picion, and it is unsafe for the Court to rely upon them.

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In support of the prayer, Dr. *Arnold* and Dr. *Swabey* submitted that the inferences, resulting from certain parts of the proof, were sufficient to establish the propositions laid down by the Court.

COURT.—There are many circumstances in this case, which would dispose the Court to go, as far as It could, to relieve the complaining party. The marriage is that of a minor child, under circumstances which must render it inconsistent with the approbation of her family, and peculiarly within the spirit of the Marriage Act, the provisions of which it is the duty of the Court to enforce; but yet, in so doing, It must adhere to principles, which will stand the test of general application. There are, certainly, peculiar difficulties in the way of the complaining party's establishment of her case; but before the Court can concede any indulgence to her, in its requisitions of strict proof, it must be shewn, that all her diligence has been used to remove those difficulties.

The present is a case greatly composed of admissions; though of admissions, certainly, of a character and description greatly distinguished from ordinary admissions; but still, if there are any means of confirming the identity, it will be more satisfactory to the Court, that those means should be resorted to. Much of what is alleged stands in allegation merely; upon this the Court requires explanation, which, if possible, must be furnished. It is the more necessary, that every elucidation of the case should be afforded, as there is no Counsel for the adverse party; and though

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the Court feels every disposition to give relief, yet It is bound to call for every possible satisfaction of proof. The Court, therefore, directs the cause to stand over for the present, to enable the party prosecuting to furnish, by affidavit, such explanation as may be possible upon the points, on which It considers the proof to be defective.

On a subsequent day, affidavits were offered of persons who had boarded in the same house with the parties, soon after their marriage, tending to establish their identity, from a detail of various circumstances.

JUDGMENT.

Sir *William Scott.* — This is a case of nullity of marriage, in which the ground of nullity assigned is, that the publication of banns has been in the name of *Charles* instead of *Thomas*, which is said to be the true name of the party. A great deal of *Irish* history has been produced, as applying to this person. He had been born in *Ireland*, baptised by a *Roman* Catholic priest, educated, taken as an assistant to his uncle, who was a surgeon, and afterwards practising in an hospital in *Dublin*, all this time passing by the name of *Thomas Henry*, and the name of *Charles* is pleaded to have been assumed. Upon the evidence adduced, three difficulties arose: first, It was not sufficiently apparent that *Thomas* was the baptismal name of the party; that that name was an authorized name, and had not merely been used in common parlance, and had therefore

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grown into repute as the real name. If such was the case, the party would have an equal right to adopt another afterwards in the same manner, and the latter name would then be as much the true name as the former one; and consequently the use of it in marriage would not be a ground of nullity. Secondly, the proof was defective upon the point, that the *Charles Henry* who was married to *Charlotte Wyatt*, was the *Thomas Henry* married in *Ireland*, and to whom all this *Irish* history applied; and, thirdly, there was a blank in the family history of this man, for two years prior to the marriage in question, and it did not appear but that he might have acquired the name of *Charles*, by use, in that interval.

Upon the first point, it is to be remarked, that the registering of *Roman* Catholic baptisms is a matter of some irregularity. The parents commonly give their children in infancy a name, to place them under the protection of some tutelary Saint; but there is no solemn ceremony on record of that act, such as is usual among other classes of Christians. In the present case, there is proof that the name of *Thomas* was given, and generally used; and, considering this irregularity, the Court is of opinion, that it may very fairly come to the conclusion, that this is the baptismal, and not an assumed name. Mr. *Henry* afterwards came to *England*, but there is no proof as to his life, or actions, for a space of two years. If, during that time, he had adopted the name of *Charles* in such a way as to supersede that of *Thomas*; if he had, by general use, acquired a kind of prescriptive right to it, and it had gone forth to the world as

his

his proper designation, it has been decided both here and in the courts of common law, that this would be the true name for the purpose of a publication of banns. Nothing of this kind, however, is shewn; but it appears that the name was evidently assumed for this special purpose. Looking then to the circumstances, in which the party is placed, and to the motives which he had for concealment, his former wife being alive, the Court can have no doubt, but that this assumption was for a fraudulent purpose; that it was for the purpose of concealing the new contract he was about to form, from the knowledge of those who were interested in preventing it. The case then comes within the range of the principle of law, that a marriage, fraudulent in its nature, and in names other than the true names of the parties, adopted for a fraudulent purpose, is absolutely null and void. The only remaining question therefore, is, whether the person thus married to *Charlotte Wyatt*, is the person who had previously gone by the name of *Thomas Henry* in *Ireland*, in the manner proved.

The proof of this rested, at first, only on the confession of the party himself, who had admitted the fact, when under examination, at *Bow Street*, upon the charge stated in the affidavit. A confession, under such circumstances, one which might subject him to such penal consequences, is certainly of greater weight than any ordinary confession; it was still, however, but a confession; and therefore, a species of proof upon which it is very unsafe for the Court to rely. The affidavits, that are now produced, fully supply the proof that is demanded upon this point, and establish the identity.

Had

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Had this additional evidence been produced, by the examination of these witnesses upon the plea, it would have saved the Court, the necessity of departing from its accustomed course of proceeding, so far as to admit of the introduction of these affidavits. It is, however, a departure, which, under the peculiar circumstances of this case, and the difficulties which the complaining party had to contend with, in proving her case, the Court thought itself warranted in submitting to; but though It is borne out in such a course, by the peculiar features in this case, the Court would not wish to have it established as a precedent in any other.

The parties must attend to their proof in the first instance; or they would find that there are few circumstances, which would induce the Court afterwards to give them the opportunity of amending it. The present case is now so fully established, that I am satisfied that the ground of nullity, as charged, is sustained, and I therefore sign the sentence declaratory of the nullity of the marriage.

" partiality to his society; that, on one occasion
" in particular, when they were all on a fishing
" party, Mrs. *Burgess* separated herself from the
" rest of the party to return with Mr. *Lane* to a
" spot, which they had left, at a distance of more
" than half a mile from where they then were;
" contrary to Mr. *Lloyd*'s expressed wish."

In *November* of the same year, Mr. *Lane*, the father of this young man, at the request of his son, and as an acknowledgment of their civilities to him, gave them an invitation to pass a few days at his house at *Leyton*. During this visit, Mr. *Lane* observed the conduct of his son and Mrs. *Burgess* towards each other; and though he did not see any personal liberties taken, yet there was generally such a particular and improper familiarity, in their behaviour towards each other, as gave him great uneasiness, and induced him to remonstrate with his son, very strongly, on the impropriety of their mutual conduct.

It is objected, on the part of the lady, that all this passed in the presence of the husband, or within the scope of his observation, and it is asked why did he not take notice of it? Undoubtedly, it would have been more prudent in him to have so done; for such marked attentions, and such acts, as sitting almost in Mrs. *Burgess*'s lap, were, to say the least of them, very unseemly, and such as are not at all usual, in persons of a class of life above the lower orders; but sometimes a husband's fondness renders him as blind to his wife's faults as to his own; and if that was not the case here, where was the proof that Mr. *Burgess* did not remonstrate? A man does not usually go upon the house-tops to reprove an impropriety of conduct in his wife; such

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remonstrances are more usually confined to hours of privacy; and it does not appear, that Mr. *Burgess* had not availed himself of some such opportunity; for the circumstance of his wife's not desisting from that course of behaviour, was no proof that no remonstrance had been made; as it is pretty evident, from many circumstances in the case, that it was not amongst this lady's peculiarities, that she had not a will of her own. It has been said also, why did not Mr. *Burgess* forbear Mr. *Lane's* company? It would, certainly, have been better if he had; but his not doing so, furnishes no very serious inference against him, as he, perhaps, did not think there was any thing really culpable in what was passing.

The criminal licence that arose out of this attachment was, during a visit of the parties at *Ryes*, the seat of Mr. *Chamberlayne*, in *Hertfordshire*, where they all went, for a few days, at *Christmas* 1814; here affairs assumed a more serious aspect still, and it is here that a charge of adultery is made, and made *for the first time*; *for no part of* the evidence refers to such a charge elsewhere. It was confined within the limits of this visit, between the 23d and 29th of *December*, and within this time it must have occurred, or not at all.

In considering the legal effect of this evidence, I must proceed on the established doctrine of this Court, as it has been laid down in various cases; that it is not necessary to prove the fact of adultery, at any certain time, or place, *modo et formâ, loco et tempore.* It will be sufficient, if the Court can infer that conclusion, as It has often done between persons living in the same house, though not seen in the same bed, or in any equivocal situa-

tion.

tion. To prevent, however, the possibility of being misled by equivocal appearances, the Court will always travel to this conclusion with every necessary caution; whilst, on the other hand, It will be careful not to suffer the object of the law to be eluded, by any combination of parties, to keep without the reach of direct and positive proof. If, then, proof of a specific act is not necessary, it is equally unnecessary that a confession, if confession there be, should apply to a particular time and place. The confession, if general, will apply to all times and places at which it might appear probable, in proof, that the fact might have taken place. Another principle is equally clear, that confession *alone* cannot be received; so says the Canon *; for, without this restriction, there would be no check upon the collusion, and imposition, that might be practised on the Court. Here, however, there is no such danger: the suit commenced, in the first instance, for a restitution of conjugal rights, and the confessions are strongly opposed to such a claim. They appear confessions wrung from a heart against its inclination, and though I will not say, that they are not within the general rule, they do not fall within the particular scope of it. Under these observations, I shall proceed to consider the effect of the evidence as to adultery.

It is deposed by Mr. *Staines Brocket Chamberlayne*, "that, during the time Mrs. *Burgess* and "Mr. *Lane* were at *Ryes*, they took every oppor-"tunity of being alone together; that, in the "evening, when the family were assembled in the "drawing-room, they used to go together to the

* Canon 105.

 "piano-

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"piano-forte, where she used to play and sing to "him; that, on the first evening when they did "this, some others of the family went to pay her "the civility of standing by her; that this was "evidently not agreeable to her, she was discon-"certed by it, in consequence of which, they were "on the subsequent evenings left to themselves: "that it was also Mrs. *Burgess*'s custom, when any "of the other ladies sat down to the instrument, "to move away immediately to another part of "the room; that she was followed by Mr. *Lane*, "who was always in attendance upon her; and "that she appeared better pleased to be engaged "in conversation with him alone, than to join any "other of the family." It appears also, that they both left the room in the evening: There are other members of this family, who say "that they "courted each other's society, and paid a degree "of attention to each other which was remarkable, "and to such a degree as to be wanting in atten-"tion and civility to the rest of the company." Mr. *Chamberlayne* deposes still more strongly— "that they sat very close to each other conti-"nually; too close a great deal; and that he re-"marked it to them in a friendly and jocose "manner; that Mr. *Lane* was sometimes sitting "almost in Mrs. *Burgess*'s lap, when the witness "told him 'he gave her no room to move;' to "which she replied, 'that she had room enough.'"

These statements, taken together, are sufficient to establish a high and undue degree of familiarity, between these parties. It has been argued, that one was an isolated and detached fact; that another was so likewise; and that none of them led to a conclusion of crime; but this is not the proper

way

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way to consider such evidence: the facts are not to be taken separately only, but in conjunction; they mutually interpret each other; their constant repetition gives them a determinate character; and such habits continuing to be persevered in in public, it is to be inferred, that the parties would go greater lengths, if opportunities of privacy occurred. Such gross indecorums, and improper familiarities, with opportunities of privacy, advance to the footing of proximate acts; and if the privacy shewn to be frequent, the Court will infer the commission of crime. Nor is evidence of this sort wanting. The parties met together, apparently by agreement, in the breakfast-room, before the rest of the company were assembled. Mr. *Chamberlayne* speaks to this part of the history, "that he used to joke with them, as being early "risers;" and though this place might be too public for any criminal act, it was not so for assignations and appointments. After dinner, *she* withdraws from the ladies, and *he* leaves the gentlemen. Her pretence was, that she might superintend the putting of her youngest child to bed: she does not return to the ladies, nor he to the gentlemen. Their absence is shewn to have been habitual, and that they retired about the same time. Circumstances, such as these, connected with the proof of previous intimacy, must be considered as laying a strong ground of probability, that they met, at such times, in private interviews.

There are, however, one or two facts which require still more particular observation. It was the intention of the family to be present at a ball at

 Hertford,

Hertford, on *Tuesday* the 27th of *December*; but that intention was afterwards abandoned. Mr. *Chamberlayne* junior, after the idea of the ball had been given up, went out into the garden, about an hour and a half before dinner, and before the family had retired to dress, when he observed the curtains of Mr. *Lane*'s room drawn—this attracted his notice; upon which he went into the drawing-room, where several of the ladies then were, but not Mrs. *Burgess*: it is proved also, that she was not in her own room at that time. There is another circumstance also deposed to—"that Mr. *Lane*, "having torn his hunting-coat, and it having been "but indifferently mended, spoke of getting Mrs. "*Burgess*'s maid to mend it better; that, in the "evening, after the gentlemen were assembled in "the drawing-room, tea being over, and a card-"table about being set out, Mr. *Lane* left the "room, saying, he would go and see, if he could "get his coat mended a little better; that, when "he was gone, Mr. *Burgess* asked his wife to sit "down to cards, which she declined; that he "pressed her to play that evening, saying, he "wished to talk to Mr. *Chamberlayne*, but she re-"fused; and presently afterwards, Mr. *Burgess* "having said, if she would not, he must, she left "the room. She returned in a few minutes, "popped her head in, and said 'So you have sat "down,' appearing to address her husband; and "then coming to the table, she asked, how far "they had got? and nothing being scored on "either side, as they were then playing the first "deal, she said, 'Oh, you have but just begun,' "and again left the room; that neither she or

" Mr

"Mr. *Lane* returned for as much as an hour; that "when they did return, they appeared much "flurried and agitated; she sat down to the in- "strument, and sang in a hurried manner; her "neck was very red, she was a good deal heated, "and so was Mr. *Lane*, all of which attracted the "deponent's attention so much, that he observed, "jokingly to them, 'that they had had warm work "with the coat; that he supposed they had all "been at it, and that it had been a hard job to "require all three,' alluding to the maid as the "third. He noticed that she was touchy and out "of humour at this; that when they sat down to- "gether at supper, he remembers that she drank "an unusual quantity of ale, and that both of them "ate quite voraciously, and were in a continued "state of agitation, which they appeared anxious "to conceal."

This, again, is not to be taken as a solitary fact, but in connection with the habits before described; and with the opportunity of privacy, that was so afforded and so sought, it would be losing sight of the natural effect of human passions, excited as those of these parties were, not to infer the consequences that are imputed to them. There is also the evidence of the servants, as to seeing Mrs. *Burgess* often coming out of Mr. *Lane*'s bed-room: *Stone* the butler, says, "that one day, about "three or four o'clock in the afternoon, having "occasion to go up stairs into the passage, where "Mr. *Lane*'s bed-room was situated, he saw Mrs. "*Burgess* coming out of Mr. *Lane*'s bed-room: "she closed the door after her, but not so as to "shut it close or hard; nothing was said; but

 "just

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" just then he heard a man's voice in the room,
" which he knew to be Mr. *Lane's*, but he could
" not distinguish what he said."

Here is an act of a married woman being seen to come out of the bed-room of a young unmarried man; a circumstance which, generally speaking, might only be considered in the light of a very high indecorum; but it is, in the present case, to be taken in conjunction with the whole conduct of these parties, and the Court is then to consider, what would be the probable consequence of such an opportunity of privacy, between them. She was seen also coming out of this room, on another occasion, and there are other opportunities of being alone together fully established.

Having now considered the testimony of others, I proceed to the testimony of her own conduct: This appears to me to have been such, as to leave no moral doubt of her guilt, both from her verbal acknowledgments, and from her letters. In her letters there are expressions, which shew the commission of the crime imputed to have happened at this place, which would entitle the husband to the sentence which he prays.

Mr. *Burgess* returns home, and is followed by his wife and children, and by Mr. *Lane*. There was great uneasiness then existing, according to the evidence of the maid-servant, who deposes, " that they then both appeared in low spirits; that " she did not know the cause, and had no reason " to suppose that Mr. *Burgess* suspected his wife's " fidelity. She did not think, that any thing serious " was the matter, until the 5th of *January* fol- " lowing, when she was rather surprised at Mr.

" *Burgess*

" *Burgess* sending a verbal message that he should
" not dine at home that day. He did not return
" until past eleven o'clock at night, when Mrs. *Bur-*
" *gess* was in bed; that, about an hour afterwards,
" she came to deponent's room, and desired her to
" prepare a bed for her in the spare room; the
" bed was prepared, and she slept apart from her
" husband that night. That, on the following day,
" Mr. *Burgess* wrote a letter to Mrs. *Barrett*, Mrs.
" *Burgess*'s mother, desiring her to come to his
" house, as a separation must take place between
" himself and his wife; that this letter was first
" shewn to Mrs. *Burgess*, by her husband's direc-
" tion, before it was forwarded. That, on the
" same day, Mrs. *Burgess* wrote a letter to Mr.
" *Lane*, which she read to the deponent; that it
" informed him, that there was to be a separation
" between her and her husband, but for what rea-
" son she could not tell, and requested him to find
" out from Mr. *Burgess*; that the next morning,
" Mrs. *Burgess* having written another letter to
" the same effect to Mr. *Lane*, an answer was re-
" ceived from him, while Mrs. *Burgess*, Mrs. *Bar-*
" *rett*, and witness were together; that Mrs. *Bar-*
" *rett* read it aloud, and the purport of it was,
" that he had seen Mr. *Burgess*, who appeared to
" him just as usual; that, at the bottom of it, there
" was something to this effect—'Has any thing
" transpired about *Ryes?*' That Mrs. *Burgess*
" sent a message the next morning, desiring to see
" her husband in her own room; that he went,
" and, after he had gone away, witness heard her
" telling her mother the particulars of the inter-
" view; that she stated, that her husband had
" charged her with having been guilty with Mr.
" *Lane*,

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" *Lane*, and had added, 'I have seen *Lane*, he " has confessed every thing, and by this time, I " suppose, he has shot himself; you are the best " judge whether what he has said is true;' and " that she had thereupon told her husband, that " whatever Mr. *Lane* had said was true."

This is a natural conversation. It is said, that it is denied by the mother, in her account of that conversation. The Court, however, cannot believe, that the mother has actually stated all that passed in that interview — merely "that her daughter had " informed her, that she had entreated her husband " not to send her away, but he would not con- " sent." It is impossible, that she should not inquire, into the cause of her being so sent away. And then — "that she had satisfied her husband of " her innocence, and that was enough, that no " one else had a right to know any thing about it;" when it appears clearly, that he had not been satisfied, any further than that he had said " he would " not expose her." With respect to the concluding part of this conversation, " that was enough, " &c." how could it be considered *enough* for a parent, without knowing the cause, which had led to such an imputation on her daughter's house! I think it is clear, that the mother's recollection must have been imperfect; and that, comparing the evidence of the maid-servant and Mrs. *Barrett* upon this point, the Court must consider, that of the former as being the most to be relied upon, and the mother's account as unnatural, and to be attributed to a failure of memory.

It is said, that Mrs. *Burgess* had been entrapped into the confession which she had made. The Court recollects, that the admission of the articles, pleading

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ing this conversation, was opposed as irrelevant.* How is that consistent with the present supposition, that she was entrapped into it. It is said, however, that she had been entrapped by his telling her what was not true, and pretending that *Lane* had made a confession, when, in fact, he had not. Supposing this to have been an artifice

20th *Nov.* 1816.

* On the admission of the allegation, which was opposed, the Court observed—This is an allegation, not in an original suit for adultery, but in bar to a suit for restitution of conjugal rights, on the part of the wife. In such a plea, the Court is disposed to allow some latitude, since it has not only to state the charges of accusation against the wife, but to account for the husband's conduct, in not bringing the suit earlier. Objection is taken to two articles only; the eleventh and the twelfth. On the eleventh, "that circumstances led the husband to suspect a criminal intercourse of his wife with Mr. *Lane*, and that he went "to her, and she denied it; but that her conduct increased his "suspicions; that he determined to separate, and wrote to her "mother; that Mrs. *Burgess* wrote a letter to Mr. *Lane*, informing him of what had passed, which she first shewed to her "maid." The objection is, that part of this will be difficult of proof, and that the latter part is very slight. It may be so; but what the husband did may be explanatory of his conduct: and that she should write to Mr. *Lane*, was at least indelicate, unless in strains of indignation; and it may be very important to see what account will be given of it. In the 12th article it is pleaded, that Mr. *Burgess* charged *Lane* with the fact, and that he admitted it. It is objected, that, this can be no evidence against her; and it certainly cannot be so used: but it is merely introductory of what follows—that *Lane* wrote to her, informing her of it, and that she shewed the letter to her maid. It may be of consequence to know how she expressed herself on this occasion; there may be something of joint acknowledgment. It is followed by what is much stronger, in another article—that the husband informed her of *Lane*'s confession, and that she admitted it was too true. By this acknowledgment, she adopts it, which is the same as if she had confessed originally herself. The matter pleaded may be important, to shew the meaning of the conversation, between her and her husband; I therefore think, that the objections to the admission of this allegation cannot be sustained.—Objection over-ruled.

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to detect her—supposing it to be false—it would not detract from the effect of her confession, since, if false, what would have been the language of an innocent, and virtuous woman, under such an accusation? She would not have pleaded guilty. Would she not rather have repelled the charge, and inveighed against her traducer with animated indignation, and not have admitted the truth of it? I see no reason, however, to think that there was any such artifice practised. Then what has been the subsequent conduct of the parties? *Lane* went abroad. Could this be, if he was conscious, that Mr. *Burgess* had unjustly traduced this lady, and that she had been entrapped into a confession, by a false assertion of a confession of his? Would he not feel himself bound to stay, to vindicate his character and her own? The letters, also, on the style of which it is unnecessary to comment, contain passages, which it is quite impossible, not to interpret as distinct admissions of detected guilt: they prove, in the clearest manner, guilt, submissive guilt, with as little merit of confession as can possibly be. No notice is taken of them in her responsive allegation; it is, however, attempted to give an explanation of her going to Mr. *Lane*'s room; but no witnesses are examined upon it.

With regard to the confessions, they have been described, as if it was common for persons circumstanced as Mrs. *Burgess* was, to run from one extreme to another; that after strongly denying guilt at one time, yet afterwards feeling conscious of some little improprieties, they, in an agony of repentance, would confess more than was true. This is an hypothesis to which the Court cannot accede, as being contrary to its own experience, which has generally found persons prone to extenuate their

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their faults, and willing always to take a lesser, rather than a greater, share of guilt than might be due to them. Again, it has been said, that the confessions were made under promises of forgiveness, and in the hope of inducing Mr. *Burgess*, by her repentance, to receive her again; but of this there is no proof whatever; for though the husband continued to live with her till the 7th of *January*, it was not till that time, that he had proofs of her actual guilt, when he had her confession, and that of Mr. *Lane*; and a man cannot act on mere suspicion, as he would on full proof. The parties remained under private separation: She acknowledged that his conduct was generous, kind, and noble—What a return has she made for such conduct, and for having been spared the shame of a public exposure? She remains quiet for some months, till Mr. *Lane* goes out of the kingdom, and, when he is out of the way, she brings forward this suit of restitution of conjugal rights, and with these confessions of guilt staring her in the face, asks the Court to enforce a cohabitation for her, with her injured husband. Not content with this, she throws into the interrogatories, imputations on his character, which are totally unfounded in fact; whilst his only fault appears to be that of having placed too much confidence in her, who deserved none.

I am of opinion, that the evidence establishes not only moral, but judicial proof of guilt, that fully entitles the husband to the sentence which he prays.

Affirmed, on Appeal, Arches, 4th *June* 1818; Delegates, 15th *November* 1819.

SULLIVAN *v.* SULLIVAN, FALSELY CALLED OLDACRE.

11th *June* 1818.

Nullity of marriage, by reason of publication of banns in false names, not supported *in fact*.

THIS was a suit of nullity of marriage, by reason of the publication of banns not being made in the true names of the parties. The suit was brought by the father of the husband, as his natural guardian.—The libel stated the circumstances, in which it was alleged, that the marriage was effected by artifices and misrepresentations, and in a clandestine manner, and in a parish to which neither of the parties belonged, and entirely unknown to the father of the minor; and that it was celebrated by banns under a false designation of the woman.

The cause was argued much at length by Dr. *Swabey*, Dr. *Phillimore*, and Dr. *Lushington*, on the part of Mr. *Sullivan;* by Dr. *Stoddart*, Dr. *Jenner*, and Dr. *Dodson*, *contrà*.

JUDGMENT.

Sir *William Scott*.—This proceeding is instituted by the Right Honourable *John Sullivan*, to annul the marriage of his son *John Augustus Sullivan* with *Maria Oldacre*, otherwise *Maria Holmes Oldacre*, which marriage was contracted and celebrated under the following circumstances:—The son *John Augustus Sullivan* was born on the 19th of *October* 1798, and having left *Eton* school, was resident during the latter part of 1815, and beginning of 1816, at his father's seat, called *Richings Lodge*, in *Buckinghamshire*, under the care of a private tutor preparing for the University. In the

year

year 1815 he began to hunt with some hounds, (which have made no small noise in the world), called the *Berkeley* hounds, at that time under the management of a Mr. *Thomas Oldacre*, who lived at *Gerard's-cross*, seven miles distant from *Richings*. The consequence of these pursuits, on the part of young Mr. *Sullivan*, was to visit frequently at the house of that person, who appears to have lived with his family, in a style of hospitality, and reception of company, not very common in such a situation of life; and with a character free, as far as the evidence discloses, from any general reproach.

The young man here became acquainted with *Maria Oldacre*, a daughter of this person, who was just three years older than Mr. *Sullivan*, being born in *October* 1795. The young woman was illegitimate, her mother, whose maiden name was *Holmes*, not being married till four months after her birth; but she was baptized as the legitimate child of the parties, and never bore, either at baptism, or on any occasion that is shown, any other names than those of *Maria Oldacre*, by which alone she was known.

The acquaintance between these two young persons ripened into intimacy, and the visits of the young man became more and more frequent. Of all this intercourse his father, Mr. *John Sullivan*, was ignorant. With the misfortune incident to most men of business, the duties of a considerable office in *London*, left him little time personally to superintend the conduct of his son, and he had therefore transferred this care to a tutor. In the present instance, the *gaudet equis canibusque* was not *custode remoto;* for the tutor accompanied his pupil occasionally on his hunting excursions, and likewise

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likewise on several (it does not exactly appear how many) of the visits just noticed. On one occasion, the young gentleman took with him two of his sisters; but still no information, respecting the conduct of his son, was derived to Mr. *John Sullivan*, either from the tutor or from any other person.

In *June* and *July* 1816, the intimacy having ripened into attachment, Mr. *John Augustus Sullivan* caused banns of marriage to be delivered at two churches, namely *St. Andrew's Holborn*, and *St. Olave's Southwark*, in the latter of which they were regularly published, by the names of *John Augustus Sullivan* and *Maria Holmes Oldacre*. The parties were afterwards married at the church of *St. Olave's*, to which parish they were both aliens; and they were both minors, she being within three months of twenty-one, he of eighteen.

In the course of the ensuing week, he informed his father of what had taken place. Mr. *John Sullivan* received the news with great surprise, and with a degree of affliction, of which, there is no reason, either from the nature of the thing itself, or from any circumstance that occurred in his behaviour at the time, to doubt the sincerity. However, upon further reflection of his own, and advice of his friends, and under the impression that the marriage was irreversible, he and his family bent under the blow, became to a certain degree reconciled, and performed some acts of civility and kindness, which, however, were soon suspended. The present proceedings were instituted by Mr. *John Sullivan*, in the first place, against Mr. *Thomas Oldacre*, as the guardian of his supposed

posed legitimate daughter; and, after her coming of age, the proceedings were continued against herself.

These facts are produced in evidence, upon the only two pleas, that have been taken in the cause — one alleging the facts on which Mr. *John Sullivan* asserts the invalidity, — the other, in which she maintains her marriage rights; and most of these facts are so little controverted, that they may be deemed common to both parties, as the foundations on which their adverse positions of law are constructed. The birth of the parties, the actual celebration of the marriage in a Church to which they were strangers, after a proclamation of banns therein, in which the name of *Holmes* was for the first time interposed in the description of *Maria Oldacre* — the entire want of consent on the part of Mr. *Sullivan*'s father to the marriage, any further than the law may imply a consent from this unopposed publication. — This is all clear and undisputed ground, to substantiate which it is unnecessary for me to apply evidence, for nobody denies it.

To the evidence of one fact, I shall, for another reason, not pay much particular attention — that which is brought to prove Mr. *John Sullivan*'s reconciliation to the marriage; for if this evidence were ever so strong and unimpeached, it could prove at the outside nothing more, than capricious conduct on his part. It could not affirm the validity of the marriage; for if that marriage were invalid for want of his consent at the time it was solemnized, no consent given afterwards could corroborate it. It must be a precedent or a contemporary consent, other-

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otherwise the marriage is radically and incurably bad.

The fact, however, is not without an explanation. For it appears, that this apparent approbation of the marriage took place, at a time when Mr. *Sullivan* considered the marriage to be irreversible. He was afterwards otherwise advised,—and then he began the present attempt to break the connexion. It is likewise true, that an interrogatory has been rather unfortunately put, on the behalf of Mr. *John Sullivan*, which insinuates, that, at the time of his reconciliation, he believed her character and conduct unimpeachable; but that, finding he had been misled, he put an end to all intercourse with her, and instituted the present suit. Mr. *Forbes*, to whom that question is put, knows nothing at all of any such matter, but puts the change of conduct on a change of opinion respecting the legal question. Certainly, if any such discovery had been made, it might naturally have augmented the father's desire to overthrow the marriage, though it would have been perfectly impossible to do it on the mere proof of such a discovery alone; for the marriage, if originally good, had got beyond the reach of all effect of character and conduct. At the same time, I am bound to discharge a debt of justice by saying, that there is nothing in the evidence before me, which, in the slightest degree, impeaches that character.

That in a house, where many young gentlemen resorted for the pursuit of field-sports, things might occasionally pass, not much calculated to cherish habits of feminine delicacy and reserve, is not im-

 probable;

probable; but I see nothing bordering on impropriety upon her part. Her parents are not inattentive to that matter. Her father expresses a disapprobation of her riding alone with young Mr. *Sullivan*; her mother desires him to write no more letters to her daughter: she is sought in marriage by a person of her own family connexion, which strongly proves, that no taint of known dishonour had attached to her: and though it is objected, that she permitted liberties to be taken by the young gentleman, Mr. *Sullivan*, at the playhouse, after *Ascot* races, when she was in fact contracted to another, those liberties are not of an offensive kind; they are slight; she is merely passive under them, and that at a time when the other person had determined her, by his inattention, to break off all further connexion with him.

It is quite impossible, if any thing grossly improper had occurred, but that it must have attracted the notice of the numerous persons who resorted to this house. Yet nothing of the sort is insinuated, except by *Beaman*, a discarded stable-servant, of whom I say, once for all, and without wasting a single observation on the particulars of his evidence, that he is a witness far more deserving of animadversion, than of credit. The testimony given by Mr. *John Augustus Sullivan* himself to this young woman's conduct, in his letter to his father, although it may be not a little coloured by present passion, is nevertheless a statement far more worthy of attention than this of *Beaman*'s. He says, he has been "for a long time attached to *Maria* "*Oldacre*, who is a very virtuous girl, but on whose "virtues he will not then dwell, but leave that for "his

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"his father to be a witness of;" and that "she, "together with her family, bears every where the "best of characters." It is quite impossible, if her conversation had been what this discarded stable-man represents, "such as would rather dis-"gust than please," that a youth, brought up in a decorous and elegant family, and in the society of gentlemen, could have approached towards such a style as this in speaking of her. I have to lament here, as well as elsewhere, that Mr. *Burder* has not been examined. He could have spoken with exact information on this point; and, in doing justice to this young woman, let That justice fall where it might, he would have relieved himself, in some degree, from the observations applied to the inattention, which is said to appear on the face of his conduct. On the whole, I see nothing to the disadvantage of her character, except what comes from the reprobated witness *Beaman*.

More has been said on the disparity of age. than I am disposed to pay much attention to; for surely no very revolting disproportion exists between a woman under twenty-one and a man nearly eighteen years of age. It might, indeed, be rather desirable, that the relative ages should be differently placed; but still they are not widely unsuitable: and as to what is said of greater maturity and experience, and knowledge of stratagem and tactics on the female side, surely a young man, who has had the experience of *Eton* school, and has a private tutor constantly at his heels, may be deemed sufficiently armed for such an encounter, without taking into the account that this

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young man appears, from his letters, to have a more sedate and reflecting mind, than is usually expected at that age.

Another disparity has been pointed out which is entitled to graver attention, — that of rank and condition: for, without adverting to extrinsic inconveniences, it is not to be denied that two persons coming together, with very different educations and systems of manners and habits, are not likely to have that correspondence and harmony of mind, without which the comfort of a married life cannot exist. At the same time it is to be remembered, that the passion, which leads to marriage, is apt to overleap these distinctions, and that marriage levels them all, both in legal and moral consideration. It is likewise to be observed, that she is of an age susceptible of better impressions; and at which objections of that kind might, in a great degree, have been removed by the plan, which Mr. *Sullivan*'s father had most wisely projected, of sending her abroad for the benefits of an improved education.

Laying such considerations aside, I proceed to consider the direct case. From the strong observations thrown out in some preliminary debate, on the admissibility of evidence, I was led to expect that it was to be argued as a case (rather of rare occurrence in these Courts) of a most foul conspiracy, directly involving four persons, the two parents, the young woman herself, and a fourth person whose name I do not repeat, because it unduly crept in at first, and has been totally omitted in all the later discussions. I confess it appeared to me rather singular, that a case so represented could be maintained, upon evidence taken

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taken on a plea, which only charged two persons at all — the two parents, and them in a slight and indefinite way—" that they used various means to " effect a marriage without the knowledge of his " father," and that " opportunities and facilities " were given ;" and that " he was prevailed upon " by their artifices and misrepresentations to con- " sent." However, the case was described in the representations of Counsel to bear very hard, and in a most criminating way, upon the four conspirators. The Court had no right to prescribe the view which the Counsel should take of their respective cases; and therefore, rejecting some evidence which appeared foreign to the question, It waited to see how the case of conspiracy was to be maintained upon this evidence.

I will not lay it down, that in no possible case can a marriage be set aside, on the ground of having been effected by a conspiracy. Suppose three or four persons were to combine to effect such a purpose by intoxicating another, and marrying him in that perverted state of mind, this Court would not hesitate to annul a marriage, on clear proof of such a cause connected with such an effect. Not many other cases occur to me, in which the co-operation of other persons to produce a marriage can be so considered, if the party was not in a state of disability, natural or artificial, which created a want of reason or volition amounting to an incapacity to consent. I presume it does not often happen, that marriages between young persons are the sole acts of the parties themselves. It is not imputed as a crime, if fair opportunities and facilities are allowed, for improving a favourable disposition, that may appear in a re-

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spectable young man towards a female of the family, and for encouraging a prospect of what the law calls an advancement of a daughter in marriage. It would create some alarm, if the Court were to lay it down, that the good offices of a mother, an aunt, or an elder sister, so performed, were to be scrutinized with a severity, that tended to call in question the validity of marriages so promoted. The object is not illegal or illaudable, if pursued with proper delicacy; of which proper delicacy different people have different measures. To some females, indeed, the promotion of marriages in general is said to be a favourite employment, without any motive arising from family connexion, and merely from a good-liking to the occupation itself. Certainly it assumes a different complexion, if these endeavours are directed to the advancement of a very unworthy object; if they are directed against a youth of green and unripe years, and with a studied concealment from his parents; and still more, if, as charged here, by vitiating and debauching the mind. These circumstances may be so mixed up as to make it a most illaudable act; and if one course of transaction be pursued, they may make the marriage null and void; but it is not to be denied that, by the existing law of this country, the same circumstances may be combined to a very frightful amount, and yet, if the marriage be effected by another course of transaction, it may constitute as valid an union, as can be produced by the most honourable means.

Suppose a young man of sixteen, in the first bloom of youth, the representative of a noble family, and the inheritor of a splendid fortune; suppose that

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he is induced, by persons connected with a female, in all respects unworthy of such an alliance, to contract a marriage with her, after due publication of banns in a parish church to which both are strangers; I say, the strongest case you could establish of the most deliberate plot, leading to a marriage the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this Court to release him from chains, which, though forged by others, he had rivetted on himself. If he is capable of consent, and has consented, the law does not ask how the consent has been induced. His own consent, however procured, *is his own act*, and he must impute all the consequences resulting from it, either to himself, or to others, whose happiness he ought to have consulted, to his own responsibility for that consent. The law looks no further back. If ten times the number of circumstances here alleged to be fraudulent, had been stated in the libel, this Court could not have admitted it, unless the *undue publication of banns* had been pleaded. That circumstance alone entitles me to entertain the cause; and if that circumstance be not proved, all the other circumstances go for nothing.

I have already observed on the slightness and obscurity of the fraud imputed, and imputed to the father and mother only, for the daughter is not at all implicated even in these. In the same article in which the charge of fraud is alleged, it is distinctly stated, that the young man *went frequently* to the house; that a great intimacy took place between them; and that he was induced by their artifices *to consent*. Therefore this is a case of

of admitted *consent*. What the artifices and misrepresentations were, is left wholly unexplained. Be they what they might, there was a *consent*, and a consent, even in this description of it, apparently not involuntary on his part. How is it on the evidence? Not a single witness to explain, or to prove, any artifices or misrepresentations whatever. All rests on probabilities and conjectures, on arguments of Counsel, that it *must* be so; as if it were a thing unprecedented that a young man of 18 should conceive a passion for a female near his own age, or as if such an event could only be accounted for, by the intervention of something approaching to the nature of spells and magic. In order to support this argument, Counsel are compelled to have recourse to rather violent distortions of facts. The father reprehends her riding out with the young man; the mother writes to him to request him not to correspond with her daughter; the cousin informs him (as the fact was) that she is already engaged; and, it is said, all this is mere simulation, in order to inflame him by an apparent opposition to his desires.

What sort of language, or what sort of conduct, is to be held? If that of direct encouragement, what would then have been said? This is discouragement, but it is argued to be all disguise, for the purpose of stimulating him further. According to such a mode of arguing, no language and no conduct would have been practicable without incurring censure. There must have been a total silence; and that, I suppose, would have been interpreted into criminal connivance. What were the artifices, what the misrepresentations employed?

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ployed? On the part of the young woman, none whatever. He was perfectly conusant of her fortune, her condition, her age; where then was the delusion? He knew that his father was in ignorance of the whole transaction, and, with this full knowledge of his own, he determined to marry her. It is impossible for evidence to show a more spontaneous and more determined movement of a young man's mind towards a marriage. All the following, all the declarations are on *his* side, and no return on *her's*, but what may fairly be attributed to an affection gradually cherished by his attentions. I may presume, without injustice, that the affection on her part was not checked by the prospect of a considerable elevation in life. Such a prospect is not apt to have such an effect. But I see no part of her conduct that bears the appearance of a hungry, an eager, and mercenary attachment. On the other hand, every word, every act of his, points to a spontaneous passion, and that with an ardour that admits of no check. He himself writes the banns, and delivers them at both Churches. His letters after marriage speak the same language of not only passionate but confirmed attachment. There is not a particle of proof, that this was incited by any studied efforts on the other side. I see nothing that can be strained to that import; and I really must say, that the averment of artifice is left entirely bare of proof, and of course can have no weight whatever in the charge.

But it is said, the courtship was not communicated to his parents, and *there* is clandestinity! By clandestinity, in the canon law, was meant the contracting of a marriage, without the full solemnities

lemnities of the Church, as by *sponsalia per verba de præsenti*, or any other defective mode. I am not aware, that clandestinity has been subjected to any legal definition by the law of *England*,—but it is introduced into the later marriage act, and seems to be there used in the popular sense, in which it is generally received; and in which this imputation charges it, of a concealment of the intended marriage from the parents of the parties, or of one of them. But on whom does the charge of clandestinity rest? Upon the son himself certainly, who was bound to communicate—and not on the young woman, who was not so bound at all; for mere silence is not clandestinity, unless you first make out the obligation on the party to communicate: nor do I know, that the law imposed any such positive obligation on her parents. Certainly it is proper and usual so to do among people in higher situations, and the omission would be deemed a gross departure from those rules of nice and delicate honour, that belong to more elevated conditions of life; but such was not the condition of these persons: Nor are they chargeable with positive fraud, if they left the discovery to the observation of his tutor, or to the vigilance of his family, or to the casualty of general report; though they undoubtedly saw the growth of this young man's passion with great satisfaction. When he had engaged his own consent most fully to marry, (which no solicitation was necessary to procure), that they should have acquiesced perfectly in the marriage, cannot be doubted; that they should, in that advanced state of things, look rather to the *efficacy* than the *regularity* of the means employed, one cannot be surprised to observe. I do not see, however,

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however, that they directed and advised those means: the merit of such advice and direction is attributed elsewhere. What part the father took, otherwise than in advising that the proper name should be used, does not at all appear. The mother, who attended at the marriage, certainly went further, and declared the parties to be (what they were not) of *Tooley-Street*, in that parish. This was going beyond what was true at that time, but which I have no right to advert to, as the marriage act forbids any proof to be now received, to show that *St. Olave's* was not the parish, in which they actually resided. In fact, I repeat, the whole charge of fraud goes very little, if at all, on this evidence, beyond *mere non-communication.* No solicitations were employed, no measures, as far as appears, taken, but what were taken at his own instance, and almost personally by his own act. I am not entitled to say, that he was moved otherwise than by his own impulse; and if so, it is impossible to maintain a charge of active conspiracy; and that being excluded, the whole is reduced to the simple question of the due or false publication of the banns.

In considering that question, I shall not deem it necessary to enter into the canonical history of banns, previous to the passing of the Marriage Act. It has become in some measure matter of antiquarian learning, at least in this part of the island; and is not unfamiliar to us from various decisions, in causes where it has been properly introduced. As little shall I think it necessary to enter into any minute analysis of the provisions of that Act, which are still more familiar to us. It is sufficient for me to state the following positions, as composing

posing clear and settled parts of the matrimonial law of this country, — built as that law is on two foundations, the ancient canon law, and modern statutes: — That banns, or proclamation of intended marriages, must be thrice published in the Church or Churches of the parish or parishes where the parties dwell, and in one of which the marriage is to be celebrated: That these banns, being notifications of the intended marriage, must indicate the parties by the description of their names and parish residences: That the law, derived, as I have described, from two sources, does, *in terms* or *in effect*, require those two particulars, but under different sanctions. A false description of residence is, by a particular clause of the modern Marriage Act, rendered a mere *impedimentum impeditivum*, — imposing on the clergyman, if the fact be known to him, the duty of not proceeding with the marriage, but not invalidating the ceremony if once performed. The publication of false names is different, though no such difference is marked in that statute; it forms an *impedimentum dirimens*, invalidating the marriage *in toto;* and this arising from the very nature of the thing, and the intent and use of the publication.

The Court has had occasion to observe, that it may, in some cases, be difficult to say what are the true names, particularly in the case of illegitimate children. They have no proper surname but what they acquire by repute; though it is a well known practice, which obtains in many instances, to give them the surname of the mother, whose children they certainly are, whoever be their father. However, if they are much tossed about in the world, in a great variety of obscure fortunes, as such persons

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sons frequently are, it may be difficult to say for certain what name they have permanently acquired, as was the case in *Wakefield* v. *Wakefield*.* In general it may be said, that where there is a name of baptism and a native surname, those are the true names, unless they have been over-ridden by the use of other names assumed and generally accredited.

Variations of the names of parties sometimes occur in banns. If they are *total*, the rule of law respecting them cannot be doubtful. It never can be contended, that such names can be deemed true designations; nor could one have supposed, that such names could have been used, but for the purposes of gross fraud; if the case of "*Mather* against *Neigh*†" had not occurred, in which the woman, from a mere idle and romantic frolic, insisted on having her banns put up in the name of *Wright*, to which she had no sort of pretension. Such a publication, whether fraudulently intended or not, *operates as a fraud*, and is therefore held to invalidate a marriage.

But, besides *total variations*, there may be *partial variations, of different degrees, from different causes, and with different effects*. The Court is, certainly, not to encourage a dangerous laxity; neither is it to disturb honest marriages by a pedantic strictness. Variations may consist in the alteration of one letter only, as it did in *Dobbyns* for *Dobbyn*‡; in more than one, as *Widowcroft* for *Meddowcroft*§; in the suppression of a name, where there are more than two, as *William Pouget* for *William*

* Vol. i. p. 394.

† Consist. 10th *July* 1807.

‡ Consist. 26th *January* 1813.

§ Suprà, p. 207.

Peter

Peter *Pouget** ; in the addition of a name, where there are only two known, as in the present case ; and in those of "*Heffer against Heffer*†," "*Tree against Quin*," and "*Dobbyn against Corneck*." Such varieties may arise not only from fraud, but from negligence, accident, error from unsettled orthography, or other causes consistent with honesty of purpose. They may disguise the name, and confound the identity, nearly as much as a total variation would do, in which case the variation is for the very same reason fatal, from whatever cause it arises. Where it does not so manifestly deceive, it is open to explanation, if it can be given. If the explanation offered implies fraud, that fraud will decide any doubt concerning the sufficiency of the name to disguise the party. The Court will, certainly, hold against the party, that what he intended to be sufficient to disguise the names,

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* Vid. supra, p. 142.

† In *Heffer* v. *Heffer*, Consist. 17th *May* 1811, an objection was taken to the admission of a libel, in a suit for the restitution of conjugal rights, brought by the wife, on the ground, that the copy of the parish register, which was exhibited, stated "that "*George Heffer* and *Anna* Sophia *Colley* were married;" and that the true name of the woman being *Anna Colley*, there was a false publication of banns. (*a*)—In *Tree* v. *Quin*, 29th *May* 1812, one of the articles of the libel (in a suit for nullity of marriage, brought by the father of a minor,) pleaded, that the woman was baptized by the name of *Martha*, and that she was known by no other; and that the banns were published in the name of *Martha* Caroline.—In *Dobbyn* v. *Corneck* (*supra*), the real name of the man was *William Augustus Dobbyn*, and of the woman, *Maria Corneck*, but the banns were published in the names of *W. A. Dobbyns* and *Maria* Philippa *Corneck*.—In these two cases, the Court overruled the objection to the admissibility of the libel, on the effect of the variation alleged, so far as to admit the case to proof, but not determining on the effect of the variations assigned. It does not appear, however, that any further proceedings were had in them.

(*a*) On 21st *Feb.* 1812, this marriage was pronounced valid.

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names, shall be so considered at least as against him. He can have no right to complain, that too strong an effect is given to his act, when he himself intended it should produce that effect. But if the explanation refers itself to causes perfectly innocent, and if it be supported by credible testimony, overcoming all the objections that may be applied against its truth, the Court will decide for the explanation, and against the sufficiency of the variation to operate as a disguise, where no such effect was intended. If the explanation should leave the matter doubtful, then evidence of general fraud intended may be let in, to decide what is left undecided on the explanation. But the only falsehood that can be shown in the first place is the falsehood, at least the insufficiency, of the explanation itself; for, till that falsehood or insufficiency is shown, there is no admission for evidence of any matter besides.

It is only by virtue of pleading, that there was a false publication of banns, that you are admitted to bring your case at all before the Court; or that the Court is authorized to receive it. The Court could not receive a libel which stated all the other circumstances of fraud here imputed, unless upon the allegation, that there was such a false publication: and if it be shown, that there was no such false publication, no evidence, applying to the other falsehoods imputed to the transaction, can be received. You may have pleaded historically, and provisionally in your libel, that such other frauds existed in the case; but you cannot originally use that evidence in any manner to impeach the publication. It would be the most circular of all arguments to say, that the falsehood in the publication

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lets in the evidence, and then that this evidence proves the falsehood of the publication. From all the cases, therefore, I take the doctrine to be, that wherever the disguising effect of the variation does not appear on the very face of the name, it is open to explanation calculated to shew, that the party has not forfeited his right by what is neither shown to *be*, nor to *operate* as a fraud—that, if no explanation is offered, the Court may generally conclude against the *bona fides* of the variation—that, if being offered, it fully and satisfactorily protects the variation from all imputation of fraud, the publication is to be recognised as a due publication, has all the authority of such, and you can bring no evidence of any other fraud connected with the marriage, except such as you would have brought in a marriage, where the publication had passed in the most orderly and regular manner. The falsehood of the publication is the whole of the case; — prove that, and every thing is proved: — without it nothing.

Is this then a case in which it appears clearly, on the face of the publication, that the variation entirely confounds the identity? I think, clearly not. I cannot consider, that the mere appearance of the name of *Holmes* could have any such effect. Upon strangers who did not know the parties, it of course could have no effect at all. To persons who were intimate with her, it would be most probably known, that the mother's name was *Holmes*: therefore they could not be much startled or misled. To those who were not intimate, it would naturally occur that it was a dormant name, one which she did not commonly bring forward; as occurs in a thousand instances; for nothing is more familiar to us than dormant names.

names. Indeed very few persons who have three names, have more than two in every-day use. If they have a third name, whether of baptism, or a surname, it seldom occurs in writing otherwise than as a mere initial flourish; in common parlance it is usually quite extinct. The case of *Pouget* was, that he was called *William* in the banns, which was really one of his three names, but that he was known only by the name of *Peter*, which was the only one by which he was generally known. In higher families, where two surnames are possessed, the christian name is often omitted, as in *Wellesley Pole* and the like. It is seldom, except on formal occasions, that the whole array of names is brought into use, or indeed any names more than two. When the singularity too of the name of *Oldacre* is considered (and the Court must advert to all the circumstances, small as well as great), I cannot think that the name of *Maria Holmes Oldacre*, used on a very formal and solemn occasion, could mislead any person with respect to the identity of *Maria Oldacre*.

Then the next question is, did this variation originate in fraud, or in what else? For I admit that the party using it is bound to explain it, and to support the explanation by proper evidence against all fair objections. The explanation here offered is, that she was born before the marriage of her parents; that her mother's maiden name was *Holmes*: that she had always borne the name of *Oldacre* only, until her own marriage was in agitation; but when she came to this solemn act — an act that was very likely to be scrutinized, and which her parents naturally thought, if it was done at all, should be

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done in a valid and effectual manner—they, under a common but very erroneous impression that she was legally entitled to her mother's maiden name, advised her to prefix *Holmes* to *Oldacre*. In truth, it is this mistake of theirs which has occasioned the whole of the present question.

No man can say that this explanation is not probable enough in itself. It is a most natural solution of the fact; and the circumstances on which it is founded, are proved in a way that compels the belief of Mr. *Sullivan* himself in his answers, for I have looked into those answers, and I find that Mr. *Sullivan* admits upon his oath, that he believes them to be true. That she was the illegitimate child of *Thomas Oldacre* and *Amelia Holmes*—that she was born four months before they repaired this misfortune by marriage—that she was baptized as the legitimate child of Mr. and Mrs. *Oldacre*, and brought up under that character and name—all these admitted facts lay the most natural foundation in the world for the only other fact that follows, and which is very sufficiently proved by two witnesses—that she was advised to use the name of *Holmes* in the publication of banns, as most properly belonging to her. It is very true, that she never had used the name of *Holmes*; in all probability she did not know that it belonged in any way to her. Even if she had known it, she probably would not have used it on any ordinary occasion, as it might have led to the necessity of unpleasant explanations. She herself was a minor, and could have had no occasion before to execute any formal instrument that required precision. Therefore no improbability arises from her not

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having ordinarily used the name before: and there is the highest probability, that, in order to secure such a marriage, she should have been honestly advised by her parents to use the name, on this occasion, as legally belonging to her.

Now, what is to be opposed to the facts and probabilities which constitute this explanation? Surmises merely. That it must have deen done to conceal the marriage from Mr. *Sullivan*, the father, — that other parts of the transaction show a fraudulent intention — and that these other frauds are to be transferred over to the publication of banns. But they do not break in upon any one fact on which the explanation rests; they leave every thing in it quite untouched. It stands perfectly good, as far as any thing can apply immediately to it; and, therefore, it is to be falsified *aliunde*, by evidence which could not be admitted at all, but on the antecedent proof of the falsehood of this very explanation. If this could be admitted, hardly a case would escape in which the slightest and most immaterial variation could be found; for you have nothing to do but to scrutinize the whole of the courtship, to find out something which you can colour as fraud, and then apply that to discolour the variation. It is argued, that whatever is clandestine is fraudulent; and therefore, in every clandestine marriage, if you can but find out a flaw in the banns, be it ever so slight, it is enveloped in the general fraud, with which, in truth and in reason, it has nothing to do; and that flaw shall enable you to set aside a marriage, which the whole body of fraud by itself would not even entitle you to question.

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In the present case, the Counsel are compelled to admit the name might be honestly used; that it might be used for the intent described in the explanation; but they say, there *might* be likewise a fraudulent intent. Why adopt this double purpose gratuitously, if the first purpose is quite adequate? If there was even a hope that the name thus varied might excite less notice, that does not make it fraudulent, supposing that her father really believed, that the name belonged properly to her. There is one circumstance decisive in my mind, that the name could not be used for fraud. *Who* was to be concealed upon this occasion? Not *Maria Oldacre*, but *John Augustus Sullivan*, whose interests his father had to protect. What would the marriage of *Maria Oldacre*, or of *Maria Holmes Oldacre*, have been to Mr. *John Sullivan?* Even if proclaimed in his own parish church, it would not have troubled him, for he did not know that such a person existed. But if the undisguised name of *John Augustus Sullivan* going to marry somebody, he knew not whom, had appeared, what would have been his sensations? The fraud then, if any had been intended, would have nestled *there*, in a partial or total disguise of that name; and the more so, as the name is a marked one. That would have been the startling point. Whose name was disguised in *Pouget*'s case? The young man's. They must have been bunglers indeed if they placed the fraud, not in the name which required to be concealed, but in that which needed no concealment. The very course of the transaction, therefore, entirely repels the suspicion of fraud.

Another circumstance, though somewhat slighter, deserves notice. It is quite impossible, but that Mr.

 John

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John Augustus Sullivan must have thoroughly known *why* this name was introduced; and if he did, it must probably have come out by some means or other, either in his letters to or personal communications with his father; but there is nothing to authorize a belief of any suggestion coming from him of improper or fraudulent conduct touching this matter. I see nothing in Mr. *Sullivan*'s answers that leads to the suspicion of any such communication from his son; and if such a communication had been so made, and been introduced into a regular plea, it would have met with the most decided contradiction from her father, whose answers upon oath utterly disclaim any such imputation.

Such is the view which I am led to take of this case, on the fullest deliberation, and with a firm conviction that it is the view which I am bound by law to take. I am not insensible of the pain which the judgment, founded upon it, may inflict on persons entitled to high respect — a respect undiminished by any thing that has occurred in this cause. It is not for me to advise those persons: their own good sense, and their own feelings, will be their best monitors. If my opinion does not mislead me, the knot of this marriage is not to be untied by the hand of the law. I have, therefore, only to pronounce that the marriage is valid, and to dismiss Mrs. *Sullivan* from the suit which has been instituted for its annulment.

Affirmed, on Appeal, Arches, 16th *June* 1819.

LADY HERBERT *v.* LORD HERBERT.

4th *July* 1817.
3d *Feb.*
30th *Ap.* } 1819.

Validity of a marriage, celebrated at Palermo according to the law of Sicily, established.

THIS was a suit for restitution of conjugal rights, brought by the Hon. *Octavia Herbert*, commonly called Lady *Herbert*, of the Parish of *St. Mary-le-bone*, against the Hon. *Robert Henry Herbert*, commonly called Lord *Herbert*, on a marriage alleged to have been celebrated between them, at *Palermo*, in the island and kingdom of *Sicily*: After the proceedings, stated below, on the part of Lord *Herbert*, a general negative issue was given to the libel, thereby denying the marriage; and as it was not a public and regular marriage, it was the object of the proceedings to prove the fact, and the validity of the marriage by the law of *Sicily*.

When the usual citation had been returned, with certificate that the party was not found to be served, &c. a further citation *viis et modis*, was issued, and returned, and a decree obtained calling on the party to appear, and see proceedings, with intimation that the court would proceed on non-appearance: a libel was then offered, and was about to be read *in pœnam*, when a proctor asserted, that he gave an appearance, under protestation to the jurisdiction of the Court, on the ground, that the house, at which the citation had been served, did not belong to Lord *Herbert* at that time, &c.

The Court was disposed to overrule this application; when Dr. *Arnold* and Dr. *Swabey*, on the part of Lord *Herbert*, submitted, that he was entitled to be heard, on the authority of the case of *Buller* v. *Dolben*, Arches, 1756, in which there was an appearance under protest, and Sir *George Hay* overruled the protest, the party not being ready, and the

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the excuse frivolous;—on appeal to the Court of Delegates, it was held, that the party ought not to be precluded from being heard.

The *Court* said—That in deference to that authority, It would not refuse to hear Lord *Herbert*, though the matter of fact, now suggested, being in contradiction of the fact on which the citation *viis et modis* had issued, ought to have been brought forward on affidavit; that there was the appearance of delay on the part of Lord *Herbert*, and it would be the duty of the Court to prevent Lady *Herbert* from receiving any prejudice. It would, therefore, permit the witnesses to be examined, *de bene esse*, during the long vacation. Dr. *Arnold* and Dr. *Swabey* suggested, that what was done before the party appeared would be a nullity. The *Court* thought, It was competent to direct the witnesses to be examined, as It had intimated; though the libel was not admitted, and the husband had appeared under protestation.

3d *Nov.* 1817.

From this decree there was an appeal to the Court of Arches: but a caveat having been entered against the issuing of the inhibition, the case was argued in the Court of Arches on that point, when the Court held, that It had a discretionary power in granting inhibition, for purposes of justice, under particular circumstances, although It would be extremely reluctant to interfere with the ordinary course of appeals, and relied on the provisions of the 96th and 97th Canons to that effect. On reference to what had passed in the Consistory Court, the Court held, that the Judge was competent to order the examination of witnesses to proceed, *de bene esse*, on the libel, as had been directed in the Court below; and on further discussion of the facts, sustained the caveat, and directed the inhibition not

to

to issue. The proceedings were then continued in the Consistory Court; and the evidence having been taken, by commission, in *Sicily*: on the 3d of *February* 1819, an objection was taken to the form, in which the examinations had been there conducted, principally on the ground, that the directions from this Court were "secretly and diligently to examine;" and that the examinations had not been taken *secretly*, but in the presence of Don *Camillo Gallo*, the substitute of the proctor for Lady *Herbert*. To this it was replied, "That the requisition was executed, in every "respect, in entire conformity with the subsisting "laws at *Palermo*, and according to their best "understanding of the terms thereof."

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JUDGMENT.

Sir *William Scott*.—The present question arises on an objection to the return, made to a requisition for examination of witnesses abroad; and it is concluded, that enough appears, on the face of the return, and on the protests accompanying it, to induce me to quash all the proceedings under the requisition, without so much as inspecting the depositions. After the length of time that this cause has been depending, and after the various obstructions, which have so long prevented its being brought to a close, the Court would greatly regret being under the necessity of protracting it still further, by acceding to the prayer which is now made. However, if the objection be of sufficient weight, the Court will be bound to act accordingly.

3d *Feb.* 1819.

The case turns on a marriage, alleged to have been contracted between these noble persons, in the

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the kingdom of *Sicily;* and great part of the evidence being to be sought there, it became necessary, according to the practice of this Court, to take out a requisition for the examination of witnesses. This instrument therefore issued. It was couched in the usual terms, and addressed to his Britannic Majesty's Consul General in the Kingdom of *Sicily*, and to the civil and ecclesiastical magistrates of that country generally. The Consul accepted the requisition, and so did a Judge of the Supreme Court of Judicature in the island; and they appear to have proceeded with great deliberation in the business, having occupied several days in the examinations, which are transmitted to this Court, with a formal return or certificate of the execution of the commission.

Several objections appear to have been taken in *Sicily*, but these are all dismissed, as irrelevant and immaterial here, one only excepted; namely, that the examination was not conducted according to the tenor of the requisition. It is urged, that the execution of the instrument ought not to have taken a wider latitude, than the instrument itself authorized and directed to be taken; that by the tenor of the commission, the witnesses should have been examined secretly; but that the fact was not so; for that one Signor *Gallo*, the person who acted in *Sicily* as the substitute of Lady *Herbert's* proctor, was present at the examinations; and that this is such, and so important a deviation from the tenor of the requisition, as to vitiate all the proceedings which have been had under it. On the other hand, it is not denied, that some error has crept into the execution of the commission, but it is said to be unintentional in its origin,

origin, and trivial in its effect. Certainly, if the Court saw any reason to apprehend, that an error, in the execution of the power delegated to the authorities in *Sicily*, was likely to lead to important consequences in the ultimate result of the suit, It would use every precaution against those consequences; but if the irregularity has arisen from the mere mistake of a word, easily misconceived, in the requisition, the Court would depart from its duty, if It did not, at least, inspect the depositions, and see whether that irregularity had really led to the consequences suggested. The requisition directs, that the witnesses should be examined *secretly*. Such is the general rule both of the civil and canon law. Our own municipal law adopts a different mode of proceeding, by *vivâ voce* examination of witnesses in open Court; but the former mode is not only practised in the Ecclesiastical Courts of this country, but in the tribunals of all those countries, where the ancient civil and canon law has been received in practice.

It must be observed, however, that the *secrecy*, prescribed by the general rule, is very much varied by local regulations: the original law is modified in different countries. Strictly, and originally, the witness was examined by the Judge himself, taking to his assistance a notary to reduce the deposition into writing, but no one else being present. *Here*, in the Ecclesiastical Courts of this country, the examinations are taken by a practitioner, who represents the judge, a notary, who reduces the deposition, and who remains quite alone with the witness. In the present case, the execution of the commission, in *Sicily*, was effected in a more dignified manner, so far as regards the persons who took

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took the examination. The Court, therefore, has some security, from the station, character, and functions of the Commissioners, that there was no intentional irregularity. I must admit, that, supposing the word *secretly*, in the requisition, had been well understood by the Commissioners, in the sense given to it in our practice, they ought to have executed it according to the law from which they received this delegated authority; for, having accepted such a delegation from a foreign country, they were not to act under it in a manner which that law could not recognize; and it is not sufficient to say, that they acted according to the law of *Sicily*.

I accede, however, entirely to the remark of Lady *Herbert's* Counsel, that the word *secretly*, is a word, in some degree, ambiguous; for there are different degrees of secrecy in the examination of witnesses, adopted in different countries. It may be considered as a *secret* examination, where the proceding is merely *januis clausis*, with closed doors, the public being excluded; but the parties, or their representatives, being present; or it may be, where the Judge and notary only are present, or where the notary alone acts as an examiner. Now, if the mode in *Sicily* is to proceed, in such matters, *januis clausis*, the Commissioners might well construe the word *secretly*, as they appear actually to have done, giving equal permission to the substituted proctors of both parties to be present. Whether it might not be advisable, in future commissions for the examination of witnesses abroad, to throw in some explanatory words, specifying the sort and degree of secrecy intended, is a question which I need not now examine; but as this commission stands, I think the proceeding of

of the Commissioners has originated in a mere misapprehension, and a misapprehension in itself very natural; and that it affords no ground whatever for suspicion of intentional irregularity. The mistake was a mistake on all sides. The substituted proctor of Lord *Herbert* did not understand the word *secretly*, as we apply it in practice. In his protest he asserts, that he himself ought to have been present, and to have been present alone, which would have been equally at variance with our rule. Where all parties laboured under a common error, it is impossible to infer any impurity in the proceeding; nor do I, at present, see any sufficient reason for rejecting the evidence. The Court, therefore, overrules the protest.

30th *Apr.* 1819.

On this day, the cause came on again upon the merits, when it was argued by Dr. *Phillimore* and Dr. *Lushington*, on the part of Lady *Herbert;* and by Dr. *Arnold* and Dr. *Swabey*, on the part of Lord *Herbert*.

JUDGMENT.

Sir *William Scott*.—This is a suit brought by the Dowager Princess of *Butera* of *Sicily*, against Lord *Herbert*, both of the persons being of noble birth and rank in their respective countries, and both of age at the time of the marriage, and, consequently, appearing in their own persons. It appears, that Lord *Herbert* was in *Sicily* in 1814, and was introduced to the family of the Prince of *Butera*, the then husband of this Lady, whose house was much frequented by the *English* nobility and gentry there resident. Lord *Herbert* was received by them both with peculiar kindness and hospi-

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hospitality; and, the husband dying early in *June* of that year, Lord *Herbert* began to pay particular attentions, of a very marked nature, to the Lady, in her widowhood. Her sister, who was the Duchess *di San Giovanni*, speaks to meeting him at her house, when he opened his arms to salute her, and on expressing her astonishment, he replied, "that he thought he was entitled to that in- " dulgence, as he was about to become her brother- " in-law." This led to further conversation, in which he declared his eager expectation of marriage, and shewed her a written promise to that effect. It appears, however, that some friends of the Lady entertained doubts as to the propriety of this marriage; as one of the witnesses says, that in a conversation with her, he advised her not to marry, as it might not be altogether suitable to her; but observed, at the same time, that it was a point for herself to decide.

The intimacy of mutual affection continued to increase, with strong declarations of a desire to marry, on the part of Lord *Herbert*; and on the 17th of *August*, the marriage took place, certainly not conformably, in point of mere ceremonial regularity, to the matrimonial rites of that country; in which, as in most other countries of *Europe*, a solemn ceremonial is appointed to be observed. But, it appears, that the Priest of the Parish was sent for, and that two Servants of the family were present; and that the Lady, and Lord *Herbert*, in their presence, declared themselves to be husband and wife.—It is said, in objection, that this was an unsolemn marriage, and so it was; but it was followed up by all the necessary forms of registration, and by other acts; and nothing was left undone by which the fact could

could be established, as having actually taken place.

This part of the case being fully proved, the only question which remains, is respecting the validity of this fact of marriage: whether, celebrated in this form, it is invalid, according to the law of the country; it being the established principle, that every marriage is to be universally recognized, which is valid according to the law of the country in which it was had, whatever that law might be. On that point, witnesses have been examined in the usual way of proving that fact, by the judgments of the professors of that law *, producing

* The eighth article of the libel pleaded, " That, by the laws, " customs, and constitutions prevailing throughout the whole " island and kingdom of *Sicily*, and especially by the decree of " the Council of *Trent*, A. D. 1563, which is received and obeyed " as law at *Palermo*, and throughout all *Sicily*, and which was in " full force there on the 17th *August* 1814, clandestine marriages " are held to be valid. It is enacted, that the mutual and free " consent of the parties contracting marriage, expressed and de- " clared in the presence of the priest of the parish in which the " parties, or one of them, resides, and in the presence of two " witnesses, is sufficient to constitute the indissoluble bond of " matrimony, and a man and woman thus married, are held to " be legally united in wedlock; and so much was and is well " known to the judges and advocates and lawyers presiding and " practising in the courts of law at *Palermo*, or other places in " the island and kingdom of *Sicily*, of the greatest reputation for " their skill and knowledge in the laws of that country, and is " in strict conformity with the exposition of the law of marriages " in that kingdom, as laid down in the writings of authors of the " greatest eminence and authority on that subject."

Ninth—" That several ordinances have, from time to time, " been promulgated, by royal authority, in *Sicily*, which affix a " civil

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producing the law, and shewing that it is the existing law, according to their opinions. They state, with great distinctness and confidence, that the Council of *Trent* is the law of *Sicily*, which requires the presence of the parish priest and two witnesses. The Court has the depositions of four professors of the law, declaring that they have no doubt whatever of the validity of a marriage so celebrated as this is proved to have been; and, indeed, the counsel here have felt, that, on this evidence, the validity could not be resisted.

It is scarcely necessary to advert to subsequent circumstances; but there is the correspondence of the

"civil punishment on persons contracting clandestine marriages, "and render the husband, if the parties are of noble birth, liable "to imprisonment for five years in a fortress, and the wife to "confinement, for the same number of years, in a convent; but "that these ordinances are never enforced, except at the suit of "the parents or guardians of the parties clandestinely married; "and it is the general usage of the King, at the petition of the "husband or wife thus clandestinely married, to direct the Supreme Court of Judicature to remit the execution of the law, "or to mitigate the severity of it; but that in no wise, by these "proceedings, or by any other regulations imposed by the civil "and canon laws prevailing in *Sicily*, is the validity of a clandestine marriage solemnized in the manner pleaded, ever "affected or called in question; but the parties thus married are "held to be validly and indissolubly united."

Tenth—"That the Honourable *Robert Henry Herbert*, commonly called Lord *Herbert*, and the Honourable *Octavia Herbert*, commonly called Lady *Herbert*, having mutually and freely "expressed their consent to be married, and having been married, "and pronounced husband and wife, by the priest of the parish "in which they or one of them resided, in the presence of two "witnesses, were and are lawful husband and wife, according "to the laws of *Sicily*."

Four

the parties, in the characters of husband and wife; letters of Lord *Herbert*, in the warmest terms of marital affection and acknowledgment, and a matrimonial cohabitation is fully proved for some days afterwards.

It appears, however, that there is in *Sicily*, a municipal and criminal law, against clandestine marriages, which subjects parties to imprisonment: the husband, if noble, in a fortress — the wife, in a convent; and there was a seclusion of these parties from each other, in consequence of this law; but not precisely, as the law prescribes, by close imprisonment. This is a law which appears to have been much dormant in the execution, and, I suppose, it is generally enforced only on the application

Four eminent advocates were examined upon these articles, and deposed to the same effect, as follows:

Don *Domenico Mastrantonio*, domiciled and resident in *Palermo*, doctor of both laws, and fiscal advocate of the High Archiepiscopal Court of the city of *Morreate*, to the eighth article of the libel deposes, "That a clandestine marriage, although "illicit by the laws of the church, is, notwithstanding, valid and "indissoluble. This point was fully established by the Council "of *Trent*, Sess. 24. c. 1. *De Reformatione*. Since this decree, "no law has been enacted repugnant thereto; on the contrary, "the said Council, with a view of obviating all judicial contests, "threatened with excommunication all those who should call "such decree in question. 'Dubitandum non est, clandestina "matrimonia libero consensu contrahentium facta, rata et vera "esse matrimonia, quamdiu ecclesia ea irrita non fecit, et proinde "jure damnandi sunt illi, ut eos synodus anathemate damnat, "qui ea vera et rata esse negant. Quique falso affirmant matri-"monia a filiis familias sine consensu parentum contracta, irrita "esse, et parentes ea rata vel irrita facere posse.' This decree "of the Council was received and adopted in *Sicily*, by an ordi-"nance of the then King *Philip* the Second; and is the only "source of sound doctrine, by which all the episcopal and royal

 "courts,

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plication of the friends of the parties; though I do not see, that the application of the family would be particularly necessary, as any other information given to the authorities, would probably be sufficient; or the government of the country might act upon its own notion: yet it is likely enough, that no such interposition of government is given, except when parents interfere for the protection of minors, or under other particular circumstances. Government was informed, in this case, by the application of Lord *Pembroke*, who was much dissatisfied with the marriage. Lord *Herbert* was sent to a fortress from which he escaped, and she to a convent, from whence she was

" courts of judicature are regulated and governed in matrimo-
" nial causes.

" A clandestine marriage is said to be contracted, when a man
" and a woman express and declare their mutual consent to
" contract matrimony, in the presence of the priest of the parish,
" or other minister by such parish priest for that purpose duly
" authorized and empowered, and in the presence of two wit-
" nesses. It is sufficient that the minister be the priest of the
" parish in which one of the parties reside. A marriage so con-
" tracted, is called a clandestine marriage, as being unaccom-
" panied by the following solemnities; *viz.* three previous pro-
" clamations during the solemn mass of the parish, on three
" distinct festivals or holidays, and the benediction of the mi-
" nister of the parish; and it is the want of this solemnity which
" occasions it to be designated as illicit. This marriage is, not-
" withstanding, valid, and the union between the parties indis-
" soluble, provided their mutual consent be expressed and
" declared in the presence of the priest of the parish and two
" witnesses, as above mentioned."

To the 9th article—" That various civil ordinances, con-
" formably to the provisions of the canon law, declaring the
" above-mentioned clandestine marriage to be illicit only, have
" been promulgated in our kingdom, which inflict a punishment

was released, on bail, to appear, if called upon; which she has not yet been, as the time is not quite expired, but will expire in the course of the present summer.

Under these circumstances, the Court is requested, on the part of Lord *Herbert*, not to pronounce for a sentence of cohabitation, to be enforced immediately, but to defer it 'till a distant day, that it may not interfere with the separation under the municipal law of *Sicily*, to which reference has been made. It is allowed, that there is no precedent for such a limitation to the ordinary decree of this Court. Is there any principle in support of it? That this Court should borrow the criminal law of *Sicily*,

" on persons contracting such marriages, and, amongst others,
" the Pragmatic Sanction of the reigning King *Ferdinand*, vol. iv.
" tit. '*De Delictis*,' which, not at all affecting or calling in
" question the indissolubility of clandestine marriages, but, on
" the contrary, respecting the same as a sacrament, merely pre-
" scribed, that the parties guilty of such an illicit act should be
" subject to punishment, which, for parties of noble birth,
" renders the husband liable to imprisonment for five years in a
" fortress, and the wife to confinement, for the same period, in
" a convent. Should the parties, however, be of ignoble birth,
" the husband is liable to banishment for five years, and the wife
" to imprisonment, in a solitary retreat, for the same period.
" The rigour of this law, however, has been repeatedly suspended
" by his Majesty, when no persons have appeared to denounce
" the parties, or enforce the execution of such law."

To the tenth article—" That the Honourable *Robert Henry*
" *Herbert*, commonly called Lord *Herbert*, and the Honourable
" *Octavia Spinelli*, Princess Dowager of *Butera*, commonly called
" Lady *Herbert*, having expressed and declared their mutual con-
" sent to become husband and wife, in the presence of the priest
" of the parochial church of *La Kalsa*, (in whose district the
" palace, wherein the Princess Dowager of *Butera* at that time
" resided, is situate) and in the presence of witnesses, as pleaded,

" I am

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Sicily, and incorporate it into its own rules; not at the suit of the friends, or of the Government of that country, but of the party himself, the husband being equally, or perhaps principally, involved in these irregularities. If the Court should accede to this prayer, I think, It would undertake a task, to which It is not competent, in its own jurisdiction; and that It would act contrary to all principle, so to take up the criminal law of a country, which is almost obsolete there, and at the prayer of the *particeps criminis* himself. If It possessed such authority, it is to be observed, that the time for this punishment is almost elapsed.

On the whole of this evidence, I have no doubt that the lady is the lawful wife of Lord *Herbert*, and the Court is bound to direct, that he should receive her as such, and certify to this Court, by the first day of *Michaelmas* Term, that he has so done.

" I am decidedly of opinion, that, by the laws of the church, and
" more especially according to the Council of *Trent*, and the civil
" law, they were and are lawful husband and wife, and indis-
" solubly united in the bond of matrimony."

The same witness, upon interrogatories—" That, according
" to the decrees of the Council of *Trent*, it is not necessary to the
" validity of a clandestine marriage, that the priest or minister
" of the parish should pronounce any words, prayers, or bene-
" diction, the presence of the priest of the parish alone being
" sufficient—that it is not necessary, that the witnesses should
" utter or pronounce any words indicative of their being wit-
" nesses to such marriage—that it is not necessary to obtain
" their consent, for intervening as such, on occasion of the cele-
" bration of a clandestine marriage—that the priest or minister
" of the parish ought to know, at the time of contracting such
" marriage, the names and surnames of the witnesses present—
" and that it is customary for either the intended husband or
" wife to furnish him with such information on the spot, or to
" leave the same with him written down on a piece of paper."

LADY KIRKWALL *v.* LORD KIRKWALL.

25th *Apr.* 1817.
13th *Feb.* 1818.

Divorce, by reason of the adultery of the Husband.—Connivance on the part of the Wife, from forbearance, not inferred.—Objection to libel *overruled.*

THIS was a question upon the admissibility of a libel, offered on the part of the Honourable *Anna Maria Fitzmaurice,* commonly called Viscountess *Kirkwall,* in a cause of divorce, instituted by her against the Honourable *John Hamilton Fitzmaurice,* commonly called Lord Viscount *Kirkwall,* by reason of alleged adultery.

In opposition to the libel, Dr. *Arnold* and Dr. *Burnaby* objected, that it did not plead the period, when the adultery first came to Lady *Kirkwall*'s knowledge. It was pleaded, that the fact occurred in 1814, and subsequently, in *London* and its neighbourhood; and that she was resident in *London* during the whole time; but yet the suit was not brought until the latter end of the year 1816. It was, therefore, to be presumed, that she was cognizant of the adultery, and acquiescing in it, particularly as she was living in a state of voluntary separation from her husband.

Dr. *Swabey* and Dr. *Lushington,* in reply to the objection, contended, that the mere residence of Lady *Kirkwall* in *London* did not, necessarily, give rise to the inference, that she was cognizant of the adultery, as a large city was, of all places, the best adapted for carrying on such an intercourse with secrecy; but were it otherwise, forbearance to a certain extent was justifiable, and even commendable on the part of a wife; and could not constitute any bar to the remedy which she might seek, after finding that her forbearance had been unavailing.

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JUDGMENT.

Sir *William Scott.*—In this case the libel pleads, "that Lord and Lady *Kirkwall* were married, by "special licence, in *August* 1802, at *Abergelly*, in "*Denbighshire;* that they lived together, from that "time, until the year 1809, and had two children. "A separation then took place, in consequence of "some unhappy differences which had arisen be- "tween them; that Lady *Kirkwall* has since re- "sided, in various places in *London*, apart from "her husband." The libel farther pleads, "that, "in the beginning of the year 1814, Lord *Kirkwall* "formed a criminal intercourse with a woman of "the name of *Taylor*, or *Hankin*, who lived in "lodgings in *Park Place, Grosvenor Square*; and "that he, from that time, was in the habit of visit- "ing her there for criminal purposes." The libel then charges various acts of adultery to have been committed by them at those and other lodgings; and further pleads, "that about the same time, "he formed a similar connexion with a married "woman of the name of *Webb*, then residing with "her husband; that he afterwards lived with her "in various lodgings, and still continues to do "so at lodgings in *Margaret Street, Cavendish* "*Square;*" and it charges adultery between them at all those places.

An objection is taken to the admissibility of this libel, on the ground, that it does not plead the period, when Lady *Kirkwall* first became acquainted with the fact of adultery, with which her husband is charged. The Court, however, is of opinion, that the objection is not sustainable, either in point of fact, or in point of law. It cannot assent to the inference, that Lady *Kirkwall* is

to be presumed cognizant of the adultery, because she lived in *London*, where it took place; as a person, in this great city, moves in a state of comparative obscurity as to his actions, to what a person does, who lives in a less populous place, where his life is open to continual observation: — *Magna urbs magna solitudo.* There is nothing in the facts charged, to shew, that Lady *Kirkwall*'s suspicion must, of necessity, have been excited, or that the adultery might not have taken place without her knowledge: but supposing that she was acquainted with it, though a husband is bound to take prompt notice of the infidelity of his wife, and is liable to have his neglect of so doing urged against him, when afterwards seeking his legal remedy; yet this doctrine is not to be pressed against a wife, unless in very particular cases.

Even in the case of a husband, it is not invariably expected, that he should show the time when the charge first came to his knowledge. It might be prudent, and expedient for the success of his suit, that he should do so, but it is not absolutely necessary — something must be allowed to convenience. Certainly, a wife would not be justified in living in the same house with her husband's concubine, sharing the turpitude of his crime, and partaking of a polluted bed; but she might have a reasonable hope of his return to her society; and forbearance, under this *spes recuperandi*, has never yet been held to constitute a bar to her legal remedy, when every hope of that kind should be extinct. I, therefore, admit this libel to proof.

On the 13th of *February* 1818, the libel being fully proved, the Court pronounced, that Lady *Kirkwall* was entitled to a divorce, and decreed accordingly.

LORD HAWKE *v.* CORRI, CALLING HERSELF LADY HAWKE.

23d *June* 1819.
16th *May* 1820.

Jactitation of Marriage.—Factum of Marriage pleaded, but not sustained in proof.—Effect of *imposition* of such celebration, if actually practised, *quære*. The Court ultimately declined to pronounce for Jactitation; it appearing to have been done, originally, with the permission of the party.

THIS was a suit of jactitation of marriage, brought by Lord *Hawke*, against *Augusta Corri*, calling herself Lady *Hawke*.

On the part of Lady *Hawke*, an allegation was offered in contradiction to the libel, pleading the circumstances of an ostensible *factum* of marriage, had under a special licence, obtained, or pretended to be obtained, by Lord *Hawke*.

Dr. *Swabey* and Dr. *Daubeny* contended, that the allegation did not plead a *factum* of marriage, *as a real and valid marriage*, and that such a plea could not be received, as a defence, in any other form; that no licence, or record of any, was exhibited; that it only averred, "that Lord *Hawke* "*declared*, that he had *obtained* a licence, and "that he produced an *instrument*, which he said "was a licence."

On the other side, Dr. *Jenner* and Dr. *Lushington* submitted, that if the allegation had pleaded a fact of marriage, even less strongly, it was sufficient to shift the proof of validity on the other party; that the averments were sufficient to put Lord *Hawke* on a proof of nullity of marriage; and if that could effectually be established, their party would be still entitled to the benefit of the facts pleaded, to repel the charge of *false* and *malicious* jactitation.

JUDG-

HAWKE v. CORRI.

23d *June* 1819.
16th *May* 1820.

JUDGMENT.

Sir *William Scott.*—This is a proceeding not very usually adopted of late years; but it has, nevertheless, I presume, a legal existence. It is brought by *Edward* Lord *Harvey Hawke*, against *Augusta Elizabeth Corri*, calling herself Lady *Hawke*, for jactitation of marriage.—The libel states, in the first article, "That Lord *Hawke* is, in no way, "married to or united with this lady," (meaning, as the Court presumes, neither in fact nor in law); "that she has falsely and maliciously boasted and "reported, that she is married to him, whereas, "in fact, no marriage has taken place; and that, "on her being desired to desist from such conduct, "she paid no attention, but continued, falsely "and maliciously, to boast and report such fact, "to the no small prejudice and injury of the "complainant." The libel goes on to pray, "that "the Court will pronounce, that she has been, in "no manner, married to the complainant; that It "will restrain her from such conduct, and con- "demn her in the costs of the suit." The proceeding is, therefore, in the nature of a criminal suit. To this libel an allegation has been given in, which is strictly defensive; and the Court is always inclined to allow great latitude to defensive pleading, unless it clearly appears, that the admission of the matter can lead to no useful result, which, certainly, does not appear to be the case here.

The allegation pleads, "that in the months of "*January*, *February*, and *March*, 1814, Lord "*Hawke*, being a widower, paid his addresses to "*Augusta Elizabeth Corri*, who was then a single "woman; that he made proposals of marriage to "her, which were accepted; that she accom- "panied him, several times, to his proctor in *Doc-*

"*tor's*

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" *tor's Commons*, for the purpose of procuring a
" special licence for their marriage, and particu-
" larly on the 19th of *March* 1814, she went with
" him, and that she remained in the carriage while
" he went into the proctor's office, for the express
" purpose, as he declared to her, of obtaining such
" licence; that, on his return, he informed her, that
" the licence would be sent to him in the even-
" ing of that day, and they accordingly agreed
" that the marriage should be solemnized on that
" same evening, at No. 22, *Park Lane*, a house
" which Lord *Hawke* had purchased for their
" future residence; that the marriage was accord-
" ingly solemnized, pursuant to the rites and cere-
" monies of the Church of *England*, by a priest or
" minister in holy orders, of the Church of *Eng-*
" *land*, or by a person whom Lord *Hawke* intro-
" duced as such; that, on this occasion, his Lord-
" ship produced a written instrument, which he
" stated was the special licence; that the marriage,
" by the request of Lord *Hawke*, was kept a secret
" for some months, but afterwards publicly
" avowed; that they cohabited together at the
" family mansion of Lord *Hawke*, in *Yorkshire*, as
" also at *Paris*, *Worthing*, and other places, until
" the month of *March* 1818; during which time, a
" correspondence occasionally took place between
" them, in which he uniformly directed to her as
" Lady *Hawke*," which letters are exhibited, and
are couched in a very strong style of conjugal affec-
tion, he signing himself her affectionate husband,
&c.; " and that he directed his children, by his
" former wife, to address her as their mother."

Now, supposing this allegation to be true, (which the Court is, for the present, bound to suppose) nothing can be clearer, than that Lord

Hawke

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Hawke has publicly and privately declared himself to be her husband. The Court entirely agrees with what has been said, that the defence might be sustained without a specific description of the fact of marriage; it is sufficient, for a *primâ facie* defence, to allege that a fact of marriage actually passed; and the burthen of proof is unquestionably shifted on the other party, to shew that any thing has occurred to invalidate it; especially as he has been, as she alleges, the party conducting the whole business throughout, and is alone in possession of the means of proof.

Looking at these facts, it is impossible for me not to say, that there is abundant *primâ facie* allegation of the fact, which, in the present stage of the proceedings, is all that is necessary. How the case may be, in a moral point of view, if it should prove that the person, who solemnized the marriage, was not a clergyman, and the paper not a licence, to the knowledge of the party who held them out as such, to a person totally ignorant of the facts, no reasonable man can doubt. What it may be, in legal consideration, it is not necessary for me to answer at present; but I am not quite prepared to say, that a marriage contracted under such circumstances, would necessarily be pronounced null and void. If the case should arise, which the plea suggests, it would present a question worthy of the best consideration that could be given to it, for the protection of the party abused by such treatment. No case has been cited to me, in which it has been proved, or has been laid down, that an innocent woman, so imposed upon, would not be entitled to the complete protection of the law. A Court, I think, would strain hard to allow her the full benefit of it, if she was really the dupe of so cruel an act of imposition.

A re-

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A responsive allegation was afterwards given by Lord *Hawke*, pleading the marriage of the defendant with *Anthony Philip Corri;* that she was at that time his lawful wife; that in 1814, she came to cohabit with him, the said Lord *Hawke*, and lived with him as his Mistress; that he then allowed her to assume his name. It further pleaded a deed of settlement upon her, on their separation, in the name of *Corri*, and reciting her to be the wife of the said *Anthony Philip Corri*.

In objection to this allegation, Dr. *Jenner* and Dr. *Lushington* submitted, that this was an abandonment of the whole case, as it set forth his own profligacy, and that as Lord *Hawke* had permitted her to use his name, there was no ground for the suit of jactitation.

Dr. *Swabey* and Dr. *Daubeny* submitted, that cohabitation was no bar to such a suit; that a suit of jactitation was the only remedy, by which the party could protect himself, and his family, from such an assumption of a false relation to himself and to them; that it thus becomes, in its consequences, a marriage cause, in which it was necessary to establish what was the real condition of the woman; that this sufficiently appeared from the contents of the allegation, and it was entitled to be admitted, and to be considered with the other facts of the case, in the final decision of the Court.

JUDGMENT.

16th *May* 1820.

Sir *William Scott*.—This is a proceeding in a cause of jactitation of marriage, brought by Lord *Hawke* against a female, who, as he represents, had usurped the title and character of his wife—a proceeding not now very familiar to this Court, but

but which it is bound to receive, for the protection of persons against the extreme inconvenience of unjust claims and pretensions to a marriage, which has no existence whatever. If a person pretends such a marriage, and proclaims it to others, the law considers it as a malicious act, subjecting the party, against whom it is set up, to various disadvantages of fortune and reputation, and imposing upon the public (which, for many reasons, is interested in knowing the real state and condition of the individuals, who compose it) an untrue character; interfering in many possible consequences with the good order of society, as well as the rights of those who are entitled to its protection. It is, therefore, a fit subject of legal redress; and this redress is to be obtained, by charging the supposed offender, with having falsely and maliciously boasted of a matrimonial connexion, and upon proof of the fact, obtaining a sentence, enjoining him, or her, to abstain in future from such false and injurious representations, and punishing the past offence by a condemnation in the costs of the proceeding.

To a charge of jactitation three different defences may be opposed. It is obvious, that the fact of having made any such representations may be denied, in which case, if not proved, the accusation shares the common fate of other unfounded charges; or secondly, it may be admitted that such representations have been made, but that they are true; for that a marriage had actually passed, and, in such a way, as to give the party a right to claim the benefit of it. In that state of things, the proceeding assumes another shape, that of a suit of nullity, and of restitution of conjugal rights, on an inquiry into the fact and validity

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validity of such asserted marriage; and it will depend upon the result of that inquiry, whether the party has falsely pretended, or truly asserted such a marriage. In the former case, the Court would pronounce a sentence of nullity, and enjoin silence in future. In the latter, the Court would enjoin the accuser to return to matrimonial cohabitation, unless it could be shewn, that some other reason was interposed to dissolve that obligation. A third defence, of more rare occurrence, is, that though no marriage has passed, yet the pretension was fully authorized by the complainant, and, therefore, though the representation is false, yet it is not malicious, and cannot be complained of, as such, by the party who has denounced it.

As far as I yet see of the present case, it is compounded of the two latter descriptions; for in one part of this female's defensive plea a marriage is set up; in the other part, her defence is rested upon the authority given by Lord *Hawke*, and not only given, but also liberally used by the nobleman himself, and upon various occasions; where, to speak of it in the gentlest terms, it could hardly have been expected. Before the Court proceeds farther in this business, which appears in such a questionable character, It has a right to know precisely, whether both these defences are sustained, or whether that of an actual marriage is entirely withdrawn, because the course of the Court will be materially varied by the answer to that question. If it is intended, that this marriage, as stated in the plea, shall be adhered to, (and if it be not, one hardly sees for what reason it found its way here,) then the Court is bound to inquire into the

the fact of its validity. If abandoned, then the attention of the Court is confined to the other plea, that of an authority given to claim the title of wife, though never married.

The description given of the marriage, certainly insinuates something of a doubt respecting its canonical regularity; for it, in some degree, appears to authorize a suspicion, that the licence was a forged instrument, and the officiating minister a mere pretender to Holy Orders. At the same time, there being no such admission, the marriage may be perfectly unexceptionable, performed by virtue of an authentic licence, and by a Clergyman regularly ordained. Lord *Hawke* does not advert at all to any such fact of marriage; but he asserts, that she was a married woman with a husband living, during his cohabitation with her; and taking that to be an undisputed fact, there is an end of any legal consequence belonging to this marriage, if it did pass in what manner it might.

But it is not an undisputed fact, for she asserts, that, at the time it took place, she was a single unmarried woman. What the real state of the case in that respect is, remains to be shewn. If it is as contended, all that the Court has to observe upon it at present is, that if any such prior marriage was existing, this act, if it passed, was a most unaccountable act of profanation, in which the parties, for no reason whatever, being adjured in the name of the Supreme Being, and in the most solemn style in which an oath can be conceived, to declare whether either of them knew of any impediment to their marriage, take upon themselves to declare that there was none, though both perfectly well knew, that there was an impediment

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diment perfectly insuperable. If that were the real case, the Court would be disinclined to stir a finger to relieve either party, both sticking deep *in eodem luto*. But if the facts were simply these, that, being a young unmarried woman, she was imposed upon by a pretended Clergyman, and a supposititious licence, the matter might perhaps be deemed an arguable point, whether a marriage, had under such an atrocious imposition practised upon her, might not bind the guilty artificer of such fraud.

It seems to be a generally accredited opinion, that, if a marriage is had by the ministration of a person in the Church, who is ostensibly in Holy Orders, and is not known or suspected by the parties to be otherwise, such marriage shall be supported. Parties who come to be married, are not expected to ask for a sight of the minister's letters of orders, and if they saw them, could not be expected to inquire into their authenticity. The same favourable principle might not be unjustly applied on behalf of an innocent young woman to this ostensible minister, though officiating in a private house, when the office is authorized, by the special licence, to be performed with just the same validity as in a Church. And even if this special licence were false, it might perhaps be considered by some as likewise an arguable point, whether the same principle, which, in favour of innocent parties, supports the act of a pretended Clergyman, might not be invoked to uphold the authority of a supposititious instrument of licence, obtruded upon a party, and deceived by so cruel a fraud; for it can as little be expected, that a young woman should ascertain the authenticity of the instrument, under

under which her marriage is to pass, as the ordination of the minister who is to perform it. Upon such points, I give no further opinion than by saying, that the Court would listen, without impatience, to any argument (whether successful or not) which had for its object to protect an innocent young woman, against the effect of so detestable a fraud.

I am to remember, that this is her own representation, still standing upon her own allegation. Am I then to understand that this marriage, so remaining still in plea, is, upon this or any other ground, abandoned? The argument, in the direction of it, appeared to imply the contrary; for it was contended, and most justly, that wherever a marriage was set up in a cause of this nature, the Court was bound to proceed in its inquiry, and could not dismiss the suit. But how do any such duties arise, if the title of marriage is totally waived? If that is withdrawn from the plea, the party cannot in the same breath call upon the Court to inquire into a fact which is disclaimed, and try a question, in which no real interest remaining is set up.*

That matter being disposed of, the question then is reduced to the other ground, of an authority given by Lord *Hawke* to the defendant, to use his name during an illicit connection between them, which lasted some years; and the fact is not only admitted by Lord *Hawke*, but avowed and asserted in his own plea, that he did so; and there is rea-

* Here it was tacitly intimated, that that part of the plea was waived.

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son in abundance to conclude, from documents produced, that the liberty was not only given, but that he himself clothed her with that character, in all places and all situations—in *England* and abroad—in *London* and at his country residences—amongst his tradesmen, his neighbours, and his friends—in his intercourses of private life, and to the representatives of foreign governments, where it was necessary to give her a true description, to entitle her to a privileged reception in the countries they represented. What is more appalling still, he introduces her to his own children by his deceased lady, as succeeding to her rights and duties, in the care and management of her unprotected offspring. I am not speaking here of the moral merits or demerits of such facts. No language of mine could be more forcible than the language of the facts themselves. I am concerned only with their *legal* quality; and I am bound to say of *that*, that it certainly deprives him of a right to complain of an injury, which, if it exist at all, he has inflicted upon himself; and this not in a moment of indiscretion, at once lamented and withdrawn, but publicly and privately, in habit and for years, without intermission, and in situations, where very powerful calls of both duty and decorum might have been expected to impose a restraint. It is difficult to maintain, that she is liable to a charge of malice for following his own authorized precedents, for adopting the character he had conferred upon her—for echoing his own assertions—and conforming to his own course of acting.

It seems to be a representation, rather insinuated than avowed, that the permission was given only

during

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during the cohabitation, and, that this having ceased, the permission is expired. This may be true; but it does not follow, that it is any part of the duty of the Ecclesiastical Court to proclaim its extinction; that Court is bound, in a cause of jactitation, to see that parties do not usurp the characters of husband and wife (characters sacred and indissoluble), to the injury of the complainant; but if there be no usurpation, if the title has been so licenced by the authority, and still more by the example, of the complainant himself, this Court will leave him to relieve himself, by his own exertions, from the inconvenience of his own acts.

It is too much to expect, that if a person imposes false characters of this nature upon the world, the Ecclesiastical Court is to interpose in his behalf, as soon as the consequences of such unfortunate conduct begin to assail him. It looks in vain to find malicious boasting in language long authorized, and used by the party himself. Persons of such habits have their quarrels and reconciliations. They likewise change these transient connections, and the new favourite is privileged with the title of her predecessor. This Court cannot follow them in these variations of humour, and conduct, and drop all recollection of the false character they have conferred, at the moment they think proper to drop it in practice. According to Lord *Hawke*'s own account, he has been living, for years, in an adulterous connection with the wife of another man, whom, for the conveniences of that connection, he has every where introduced and qualified as his own. What protection he may find in other Courts from the molestation of claims

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originating from this imposture, which he has practised upon the world, is not for me to inquire. He must fight through the difficulties he has created; and in every case, he will have the protection to which he is legally entitled. But this Court cannot indulge him with a general exemption from all possible inconvenience, by pronouncing a sentence of malicious jactitation against the person, whom he himself has tutored to use the language of which he complains.—Suit dismissed.

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16th *July* 1819.

Divorce, by reason of Adultery, barred by the *compensatio criminis*, committed even *after* the Adultery of the Defendant — *Recrimination* sustained.

THIS was a case of divorce, by reason of adultery, brought by the husband against the wife, in which the principle of recrimination was fully discussed, and with reference to *acts* of the husband subsequent to the commencement of the suit.

The case was argued by Dr. *Swabey* and Dr. *Lushington*, for the husband; by Dr. *Arnold* and Dr. *Jenner* for the wife.

JUDGMENT.

Sir *William Scott.*—This is a suit for a divorce, by reason of adultery, instituted by *Charles Proctor*, Esq. against *Elizabeth Mary Proctor*, his wife. The libel states "the marriage of the parties to "have taken place on the 13th of *September* 1810, "and their cohabitation together, from that time "until the month of *August* 1814, when they left "*London*, for the purpose of making a tour on the "Continent; that they proceeded on their route, "and reached *Naples* in *January* 1815, where they

"remained

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" remained some time, and during their residence
" there became acquainted with a Mr. *French*,
" an *Irish* gentleman, with whom they formed an
" intimate connexion. Mr. *French* being also on
" an excursion of pleasure, and having ascertained
" the destination of Mr. and Mrs. *Proctor*, pro-
" posed to accompany them, which was agreed to,
" and they shortly afterwards left *Naples* together,
" and continued so until they reached *Brussels*.
" During this time, the intimacy between Mr.
" *French* and Mrs. *Proctor* increased, and several
" acts coming to the knowledge of Mr. *Proctor*'s
" valet, which excited his suspicions, he thought
" himself bound to communicate them to his
" master, upon which Mr. *Proctor* determined to
" travel no further with Mr. *French*; and, on their
" arrival at *Brussels*, under pretence of their ser-
" vants disagreeing, Mr. *Proctor* proposed that
" they should separate, which was agreed to, and
" Mr. *French* proceeded to *Paris*, and Mr. and
" Mrs. *Proctor* to *London*."

Notwithstanding this separation, the intercourse was still carried on by a correspondence; Mrs. *Proctor* receiving her letters under the feigned name of Madame *Woolfort*, at several places on the Continent, until their arrival in *London*, at *Gordon*'s Hotel, in *August* 1815. Shortly after Mr. and Mrs. *Proctor*'s arrival in *London*, Mr. *French* also arrived, and took up his residence at *Long*'s Hotel, when the correspondence was renewed, and a person of the name of *Lee*, and another, the servants of the coffee-houses, were employed in carrying the letters. Mrs. *Proctor* about this time sent for a jeweller, and ordered two rings, one to be ornamented with two hearts entwined,

 doves,

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doves, and such like emblems of *purity*, and to be enriched with emeralds; the other to bear the same emblems, and the following motto to be inscribed on the inside of it—"*J'avois gouté le plaisir,* " *et croyois concevoir la bonheur. Ah! je n'avois* " *senti qu'un vain songe, et n'imaginois que le bon-* " *heur d'un enfant.*" These rings were carefully wrapped up, and sent to her under the aforesaid feigned name of *Woolfort.* They remained a short time at *Gordon*'s Hotel, and then returned to Mr. *Proctor*'s seat, *Mardox*, near *Ware*, where the correspondence was still carried on. Mr. *Proctor*, having good reason to suspect the fidelity of his wife, determined to be convinced of it, by searching his post-bag, and there he found a letter, in his wife's hand-writing, addressed to Mr. *French.* This fact confirming his suspicions, he immediately repaired to the house of Mr. *Hale*, the father of Mrs. *Proctor*, and related to him the circumstance, when he advised him to bring Mrs. *Proctor* to his house, without acquainting her with the object, and the matter should be then thoroughly investigated. This was accordingly done; and, upon her being accused of her criminal correspondence, she strongly denied it; but on the letter being produced, she appeared extremely agitated, and left the room. She afterwards admitted her guilt, and implored pardon from her injured husband. On the developement of these facts, Mr. *Proctor* was determined to seek redress against Mr. *French*, and consulted his legal advisers for that purpose; but, from the absence of witnesses abroad, he was unable to proceed. Pending the inquiry, however, it was ascertained that a criminal intercourse had taken place with

 this

this lady and Mr. *Standish*, a gentleman to whom she had been introduced at *Rome*, and so conclusive was the information of this circumstance, that Mr. *Proctor* commenced a suit at Common Law, the result of which was a verdict in his favour, and damages, to the amount of £500, were awarded him.

It will be unnecessary to enter into a minute detail of the evidence in this case; it will be enough to say, that the proof is abundant, and quite sufficient to maintain more than the individual case; and, therefore, if it rested here, Mr. *Proctor* would be entitled to the sentence of the Court: But it does not. Mrs. *Proctor*, notwithstanding all her professions of sorrow, regret, and her imploring acknowledgments of penitence and affection, has accused her husband of a criminal intercourse with a person of the name of *Charlotte Phipps*, which the Counsel on his behalf were compelled to admit; but it appears, that he had not any intercourse with this person, until after the infidelity of his wife had been clearly established.

Upon this state of facts, a question arises, whether the party has forfeited his remedy of a legal separation from his offending wife, by his incontinence proved to have taken place subsequent to the discovery of his wife's infidelity, there being no reason to presume otherwise, than that he had always confined himself to his marriage bed, till after the voluntary separation which followed the discovery? It is impossible not to see, that if this relief of a legal separation is withheld, both himself and his innocent family may eventually become sufferers to a very great extent. He will be *primâ facie* the father of the spurious offspring

 which,

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which, from the past experience of her conduct, she may be likely enough to produce. He is *primâ facie* liable for the debts, which she is likely to contract in this state of separation. He will be under the necessity of proving, by means not always easy or convenient to be had, an absolute non-intercourse, in order to deliver himself from these painful obligations whenever they press. It is to be added, that he is likewise to be barred, in consequence of a failure in his present application, from obtaining that complete relief which the Legislature is in the modern habits of dispensing, of an entire dissolution of all connection with a woman who has violated all her conjugal duties, and made his marriage bed a scene of pollution and dishonour. These are consequences that must be admitted to press with sufficient severity upon a husband, whose own irregularities may naturally be supposed to have had a main part of their origin in the failures of duty on the part of the wife; and if the law does really impose them, it is fair to presume, that it has provided against them in some way or other, reconcileable with its notions of the marriage contract, and of the duties of the parties to each other, in the relation in which they happen to be placed.

There can be no question that the legal nature of the marriage contract, in this country, had its entire root in the ancient Canon Law of *Europe*; not indeed since the Reformation, to the full extent of that law which considered it as an absolute Sacrament; but to the extent of considering it in each case as an act highly spiritual, consecrated by divine authority, and as such indissoluble by human power for any cause whatever. The obligations of

marriage might be suspended but could not be extinguished, the parties might be released in certain cases from personal cohabitation, but the relation of husband and wife still subsisted. — These were characters absolutely indelible. No breach of the marriage duties affected the sacred *vinculum*. If the parties were released from personal cohabitation for reasons allowed by the law, yet still as the *vinculum* remained, the guilt of adultery was just as much liable to be incurred by any act then committed, as when the parties were living in conjugal society, and in the apparent discharge of all matrimonial obligations. The *corpus delicti* is the same, because *manente vinculo, semper remanent conjuges.*

It was a doctrine not peculiar to the Canon Law, that it looked with disfavour to a complaining party, who was himself an offender in the same way; for the Civil Law, certainly, did the same, to the extent of not barring the wife's demand of dower against such a husband. In one text of the Civil Law usually quoted upon this subject, which *Brissonius* justly calls *insignis sententia*, the allowance of dower seems referred to the supposition, that the husband had betrayed the wife into acts of infidelity, by the seductions amd provocations of evil examples of his own: "*Iudex debet inquirere an maritus pudicè*
" *vivens mulieri quoque bonos mores colendi auctor*
" *fuerit. Periniquum enim videtur esse, ut pudicitiam*
" *vir ab uxore exigat quam ipse non exhibeat.*" *
Certain it is, that the general maxim of compensa-

* Dig. 48. 5. 13.

tion,

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tion, as applied to mutual moral failings, was forged in that mint.—"*Viro atque uxore invicem accu-* "*santibus, causam repudii dedisse utrumque pro-* "*nuntiatum est: Id ita accipi debet, ut eâ lege,* "*quam ambo contempserunt, neuter vindicetur:* "*paria enim delicta mutua pensatione dissolvun-* "*tur**;" a maxim which it applied to other cases of mutual misconduct.

I do not find any express text, that applies to the particular case of granting a legal separation to a husband, who had remained constant to his marriage bed till after he had detected the infidelity of his wife, and retired from her society. No such favourable distinction is intimated any where in that system, as far as I recollect. There can be no doubt that the Canon Law acknowledged none such; the contrary flowed naturally from its peculiar doctrine of the absolute indissolubility of marriage. For the *vinculum* remaining perfectly unaffected by the adultery of either party, or by a private separation consequent thereon, the parties *remanent conjuges,* and an adultery then committed, was as direct and gross an infraction of that *vinculum* as if committed at any other period, and as such, was held equivalent to it. It was a *par delictum,* subject to the same rule of compensation, which leaves the parties to find their common remedy in common humiliation, and mutual forgiveness. It provides against the mischiefs to which a husband might be exposed by such a wife living apart, by its known doctrine, that all separations merely voluntary are totally illegal, not to be either tolerated or presumed.

* Dig. 24. 3. 39.

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It acknowledges no intermediate state between a cohabitation and a formal separation. It, therefore, presumes, when it withholds its divorce of separation, that the parties return to cohabitation; all matters return to their former course, but with increased vigour; the husband and wife live again on their former footing, and there is no anticipation of separate debts, or of the probability of a spurious offspring. That such is the doctrine of the Canon Law is most certain, the authorities are numerous and precise to that effect; the texts of the Canon Law, the dicta of all Commentators and Professors, concur in holding out, that there is no distinction between a delinquency of the husband committed *before* or *after* a wife's infidelity, in its complete efficiency as a bar to a claim of legal separation.*

I should

* The following quotations were introduced into this part of the judgment :—

Decr. Greg. ix. 5, tit. 16. vii.—" Tua fraternitas requisivit utrum " aliquo deneganti uxori suæ in adulterio deprehensæ debitum " conjugale, si postmodum ipse cum alia perpetret adulterium " manifeste, cogi debeat ut uxorem maritali affectione pertractet: " super quo taliter respondemus, quod cum paria crimina com- " pensatione mutua deleantur, vir hujusmodi fornicationis suæ " obtentu uxoris nequit consortium declinare."

Panorm. in loco cit.—" Nota, quod licet propter adulterium " mulieris possit separari matrimonium quoad torum, non potest " maritus cum alia cohabitare, sed tenetur continere, alias ad " uxorem redire, quia licet propter adulterium separetur matri- " monium quoad torum, non tamen quoad vinculum quia rema- " nent conjuges."—He maintains, that after sentence of adultery obtained against the wife, the judge may, *ex officio*, compel the offending husband to return to the wife—" Ne propter sepa- " rationem jaceant in peccato."

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I should subject the Court to the charge of idle pedantry, if I were to multiply authorities upon a point so clearly established. If the Canon Law is to be taken as the guide, there is certainly an end of all question on the subject. If it be not, then the question must rest upon modern decisions of our own (which, I am sorry to say, no diligence of myself, or others, have been able to produce); and if *they* are wanting, recourse must be had to the general principles of reason, morality, and public convenience, applicable to such a case.

Upon the first point, the binding authority of the Canon Law in *causes matrimonial*, depending in these Courts, I look without success, for any principle on which I can hold, that they can release themselves, by any power of their own, from a submission to that authority. The release, if proper, must come from a higher authority than they possess. It is notorious that this country, at the Reformation, adopted almost the whole of the Law of Matrimony, together with all its doctrines of indissolubility, of contracts *per verba de presenti et*

Lancellottus, l. ii. tit. 16.—" Sœpius accidit, ut matrimonii " remanente sacramento thori tantum fiat separatio, quo casu " matrimonium minime aboletur, sed sibi sunt invicem conjuges, " etiam separati."—" Nuptiale fœdus non aboletur inter eos qui " etiam adulterii causa sejunguntur matrimonium inter fideles " contractum, aut consummatum nullo casu quoad vinculum " solvi posset."

Greg. Dec. ix. 4. tit. 19. iv.—" Repelletur uxor petens resti- " tutionem mariti, si notorie fornicata est, et maritus continuit. " Consultationi tuæ respondemus quod si notorium est mulie- " rem, adulterium commississe præfatus vir cogi non potest nisi " constaret ipsum cum aliâ adulterium commisisse."

Sanchez,

et per verba de futuro, of separations *a mensâ et thoro*, and many others; the whole of our Matrimonial Law is, in matter and form, constructed upon it: some Canons of our own may have varied it; and a higher authority, that of the Legislature, has swept away some important parts of it. But the doctrine of indissolubility remains in full force. The very practice of the Legislature in granting, by special acts, particular divorces in particular cases, affirms the indissolubility as existing in the general law, and to be maintained by the Courts in their dispensations of justice. The principle of indissolubility brings with it all its consequences, and amongst the rest the consequence, that every breach of the remaining *vinculum* continues with all the legal brand of adultery upon it full as much as at any period of its existence. It is a *par delictum* with any other act of adultery, that may have taken place during any former period of the marriage contract—of course it carries with it all the disability which

Sanchez 10, *Disp.* 6. *de Divortiis.*—" Lapsus hic in adulterium " potest contingere *ante* et *post* sententiam divortii latam; in " utroque eventu disputatur. Prima conclusio certissima apud " omnes est quando contingit ante latam sententiam utrumque " conjugem adulterari, neutri licet ab alio divertere, sed mutuâ " compensatione ambo adulteria abolentur."—" Nil refert ad " hoc, uter conjugum prius sit lapsus in adulterium, quia jura " solum ponderant, utrumque conjugem simili crimine jam infici " et neutrum matrimonii fidem illæsam servasse, non habitâ " ratione prioritatis vel posterioritatis delicti idque verissimum " est & nullum dubitantem inveni."—" quando ante divortii " sententiam contingeret innocentis lapsus, constat inter omnes, " doctores teneri hunc ad conjugem dimissam; immo post sen- " tentiam satis probabiliter docent multi."

an

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an adultery creates of obtaining an authorized separation.

Taking this, as I think I am compelled to do, as the rule of law binding upon the judgments of this Court, I cannot blind myself to the fact, that the modern course of life and manners does not furnish those corrections of the mischiefs that may follow, which the Canon Law had anticipated in connexion with its Rule. There is no return to cohabitation, nor are any means to be resorted to for the purpose of compelling it. In the state of separation, whether authorized or merely conventional, which usually takes place, there is certainly the increased danger of a spurious offspring, and, as the regulations of property exist amongst us, the danger of separate debts, to the great eventual injury of the husband and his legitimate family. But even if such mischiefs may be presumed to follow the modern application of the Rule, this Court still remains under the legal obligation of adhering to it, till a competent authority provides another. Whether the inconveniences of the Rule, as it now operates, (considered as they ought to be in opposition to those which might follow the reversal of it,) are such as nevertheless ought to produce a reversal, is a question which this Court has neither a right nor a duty to inquire. Whether a Rule, which should relax the obligations of a husband to purity of manners, and should enable him, with little or no hazard, to practise an unlawful retaliation upon an offending wife, and this upon his own private knowledge, (whether real, or assumed) of her infidelity not yet legally proved; — whether such a relax-

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relaxation should take place on account of his children, whom he ought to have protected by the regularity of his own conduct; whether such a Rule could be established with perfect safety to the interests of general morality, and to the claims of equal justice between the sexes, are considerations that lie beyond the limits of the present inquiry? — that is confined within the narrow bounds of this question, whether the husband under the existing Rule of Law is entitled to a legal separation — and I am of opinion that he is not.

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Subtraction of Tithes.—Endowment.—Small Tithes.—Exemptions overruled.

THIS was a suit, brought by the Rev. *Henry Allen Lagden*, vicar of the parish of *Ware* with *Thundridge* annexed, in the county of *Hertford*, against *William Flack*, a parishioner, and occupier of land in the parish of *Ware*, for the tithes of tares, clover, and wood.*

* In reading the evidence, an objection was taken to one of the witnesses, on the ground that he was a farmer, occupying land in the parish, who might be interested in the result of this suit. The Court held — that, although he had no direct interest, he might be ultimately interested in the event of the suit; and the party had not waived the objection merely by administering interrogatories to him, as it did not appear that he was designated as farmer in the parish; but if so, *non constat*, that he is a farmer of wood land. It is a matter of ordinary prudence to administer the interrogatories, and the objection is taken the first time they are offered to be read. The Court is bound to consider this witness as incompetent by law — therefore, rejects his evidence.

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In support of the demand, Dr. *Swabey* and Dr. *Lushington* contended, that the Vicar was, by his endowment *, entitled to all tithes, except corn and hay; that clover and tares were articles of modern introduction, since the endowment, and could not be considered as coming under the denomination of hay, more particularly when they were used green †, and did not undergo the process by which hay was distinguished. That, on the exemption claimed for wood, it was asserted to depend on special custom, and could be supported on no other ground; but no proof was offered on that point. With respect to the exemption for glebe land, belonging to the impropriate rectory in the occupation of the defendant, as

* The additional articles to the libel pleaded—First, " that, " in the year 1231, *Roger* then Bishop of *London*, and *Geoffrey* " Dean of the church of *St. Paul, London*, made a certain com- " position or endowment concerning the Vicar of the parish " church of *Ware*, ordaining that the vicar and his successors " should receive all small tithes and oblations whatsoever, and " all things to the said Church of *Ware* and Chapel of *Thun-* " *drych* appertaining, or which, in future, might appertain, ex- " cept the tithes of corn, &c. That the same vicar, and other " vicars also, should receive the tithes of wood, trees, and under- " wood, &c. of all forests, groves, dales, and hedges of the whole " parish of the vill of *Ware* and *Thundrych*, and of flax and " hemp, gardens and fruit, wool, lambs, pigs, geese, cygnets, " calves, cheese, butter, milk, and agistment of animals, tithes " of stags, rabbits, fish, and all birds, tithes of mills, merchan- " dize, gains, and lodging-houses, &c."

† The libel pleaded, " That the said tares and clover were " used green, or caused to be used green, by the said *William* " *Flack*, for the feed of horses and other cattle belonging to " him or other persons, without setting out the tithe or tenth " part thereof, which was and is justly due to the Vicar of the " said parish."

lessee

lessee of Trinity College, *Cambridge*, it was a distinction perfectly familiar in practice, that such exemption did not extend beyond the personal occupation of the clerical person, and could not be transferred to his lessee.

On the other side, Dr. *Arnold* and Dr. *Adams* contended, that clover was of the nature of hay, as a species of the same genus; and that there was no distinction between cutting it green and making it into hay, otherwise than when it might be fed off, in which case it was agistment. That, as to the exemption from the tithe of wood, it was true, that no evidence of particular custom had been adduced. As to the privilege of the lessee of the rector, it did not stand merely on the clerical character of the lessor, but on this further distinction, that glebe of the rector was not liable, if it had belonged to the impropriator at the time of the endowment of the vicarage, or if the land had come to the parsonage after such endowment. This benefice was appropriated at the time of the endowment; for the prior of *Ware* was bound to find a vicar, and the penalty for not complying with the terms then settled was, that the vicar should have part of the great tithes: It continued appropriate to the priory 'till the dissolution; it then devolved to the Crown, and from thence passed to Trinity College. It is, therefore, within a case cited from *Cro. Eliz.* *; and it is further to be observed, that rights of this kind are reserved to the College by the lease.

* *Blinco* v. *Barksdale*, *Cro. Eliz.* 578.

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In reply, it was said, that, by the general rule, such lands would be liable to tithe under the distinctions before noted; that the case quoted from *Cro. Eliz.* did not affect that argument, as the lands there referred to, as discharged at the time of the endowment, were considered as discharged by specific exemption, and not merely as belonging to the rectory. *

JUDGMENT.

Sir *William Scott.*—This is a suit, brought by the Vicar of the parish of *Ware* against *William Flack*, one of his parishioners, for tithes of clover and tares used green, and for wood consumed as fuel in his house of husbandry in the parish. The endowment has been exhibited; and the general right of tithes is not resisted, otherwise than with respect to the character of the particular tithe of clover and tares, and the claims of exemption as to the wood. On the first article, which relates to the tithe of tares and clover not made into hay, " but cut, mown, " and used green, or caused to be used green for the " feed of horses and other cattle," it is contended, on the part of the Vicar, who claims all the tithes, except those of corn and hay, that clover and tares so used, are not to be considered as coming within the exception. I learn, however, from the highest autho-

* The principal cases referred to were,—(Clover)—*Franklyn* v. *Bennet*, *Bunb.* 79. *Darrel* v. *Withers*, 3 *Keb.* 479. *Wallis* v. *Paine* and *Underhill*, 2 *Gw.* 749. 2 *Com.* Rep. 633. *White* v. *Read*, 1 *Wood*, 158. *Wood* v. *Harrison*, *Ambler*, 563.—(Tares) —*Hodgson* v. *Smith*, 2 *Wood*, 21. 2 *Gw.* 773. *Steers* v. *Brassier*, 2 *Gw.* 742.—(Wood)—*Walton* v. *Tryon*, 2 *Gw.* 829. *Norton* v. *Fermer*, *Cro. Car.* 113. *Erskine* v. *Ruffle* and *Brewster*, 3 *Gw.* 969.

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authority in the Court of Exchequer, that grass, when separated from the soil by an instrument, though used green, is a great tithe; it then follows the nature of its genus: but if separated by the mouth of the animal, it is an agistment, and a small tithe. The claim, therefore, of the Vicar, on that article, cannot be maintained.

I am next to consider the ground of the exemption, that has been contended for, with respect to tithe of wood used in fuel by the farmer, in his house of husbandry.* This is a remote principle, and might apply to a variety of other articles consumed in the house. If it is a custom, it is one *strictissimi juris*, being against common right, by which tithe is due, and, therefore, requires to be established on the fullest evidence. In the present case, no exemption nor special compensation to the Parson is shewn: this defence, therefore, cannot be maintained.

The next exemption claimed, is for glebe land in the occupation of the defendant, as lessee under Trinity College, *Cambridge*. Supposing that Trinity College could be deemed a spiritual foundation, still the Court would, I think, set afloat all established law, which It has always understood on this point, if It decided, that the Vicar is not entitled to the tithe of this glebe. It has been constantly held, that if land has no

* The sixth article of the allegation given in by *William Flack* pleaded, "That, by ancient custom in the said parishes of *Ware* "and *Thundridge*, no tithe is due or payable, or hath usually "been paid to the Vicar for the time being, of wood, cut and "consumed by the inhabitants and occupiers of land in the "said parishes, as fuel in their houses, occupied by them within "the said parishes for the purposes of husbandry."

 discharge

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discharge of itself, it is discharged only in *the hands* of the ecclesiastical owner, under the maxim, "*Ecclesia decimas non solvit ecclesiæ;*" a maxim that is binding as long as the land is actually held by an ecclesiastic; but if it is transferred into the hands of laymen, it becomes liable. The authority of all cases is to that effect, though the circumstances of each case may not be accurately set forth; but they all come under the same principle. A person may shew, that lands are discharged in their own right; if they are not so, but by a personal exemption alone, that will not extend beyond the person; for the privilege being only personal, does not travel from the Parson to the Lay-lessee. There are large words in the endowment, as to *wood*, in favour of the Vicar, and it is true also, that there are large words in the lease, implying something like a title in Trinity College *, through whom this defendant claims to be exempted, by virtue of his lease, but they are not parties, and claim nothing for themselves. It does

* The defendant set forth in his answers, "That he holds "and possesses, and during all the time mentioned in the libel "hath held and possessed, the parsonage and rectory of *Ware*, "and the tithes and profits of the church, chapel, or chantry of "*Thundrych*, with all and singular the glebe lands, tenements, "meadows, pastures, feedings, tithes, obventions, fruits, woods, "and underwood, &c. &c. to the said church belonging, *with* "a reservation to the lessors, (namely, the master, fellows, and "scholars of Trinity College, *Cambridge*,) of certain lands of "the advowson of the vicarage, of the tithe of wood and mills, "belonging to the said rectory, &c. together with the royalties, "interest, tithe, and right of keeping courts, and the profits, "and other duties and rights, coming of the said courts, as "lessee, by virtue of a lease from the said masters, fellows, and "scholars."

not

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not appear that there has been any thing paid, *or claimed, on their behalf.* I must consider, therefore, the words of *reservation,* referring to them, as surplusage.

If lands have any local privilege, the burthen of proof is on the defendant: nothing of that kind, however, is here alleged; and I see no ground for such a claim. Lands, it is true, in the actual occupation of the monks, were discharged from the payment of tithe, as belonging to ecclesiastical persons; but there is no exemption shewn here: on the contrary, there has been a payment by the lessee.

On the question of costs, the Court said,—I am inclined to give, *generally,* to the Clergyman his costs; and where he has succeeded in any part of his suit, he should have them. In this case, the Clergyman has incurred great expence in substantiating his just charges. With respect to the first point in discussion, in which he has not succeeded, I shall not allow the expence of the pleading; but the *general* costs must be given; not the *particular* expences on this point, on which he has failed; and I beg, that the Registrar will observe the distinction.

MORTIMER *v.* MORTIMER.

9th *Feb.* 1820.

Divorce by reason of adultery: Confession, in *articulo mortis*, as then apprehended, afterwards retracted: *Effect*, as pleaded. Objection overruled.—Cause ultimately settled by agreement.

THIS was a suit, brought by the wife, for a restitution of conjugal rights; in which an allegation was now offered, on behalf of the husband, pleading her familiarities with another man, and *her confession of adultery* with him. It further stated, that, at the time of the confession, the husband not being able to prove an act of adultery, had not sued for a separation, and further alleging the specific charges of adultery, and that the adultery was carried on for a long time.

The facts alleged were these: — that in the year 1805, Mr. *Mortimer* married this lady, then a Miss *St. Barbe;* that they cohabited together until 1811; that in the year 1807, whilst living at *Blackheath*, they became acquainted with a Mr. *W. A. Young*, who subsequently was much at the house; but no suspicion of any improper conduct on his part then entered the mind of Mr. *Mortimer*. In *August* 1811, Mrs. *Mortimer* being attacked with a very alarming illness, voluntarily confessed to her husband, that she had some time before carried on a criminal intercourse with Mr. *Young;* and the same evening, after taking the sacrament, repeated the same confession to her sister-in-law. Mr. *Mortimer*, on receiving this intelligence, endeavoured to procure other proof of the fact, but could only ascertain that some familiarities had been seen to pass between the parties, but not sufficient, as he then thought, to enable him to obtain a legal divorce. On Mrs. *Mortimer*'s recovery, her husband took her home to her father,

and

and communicated to him the circumstances, when it was mutually agreed that she should reside at her father's house, on an allowance from her husband of £100 a year, and articles of separation were accordingly drawn up, on which all parties continued to act, until the father's death, in 1816; subsequent to which Mrs. *Mortimer* instituted this suit against her husband, for restitution of conjugal rights.

Dr. *Burnaby* and Dr. *Lushington* opposed the admission of the allegation, on the ground that, independently of the confession of Mrs. *Mortimer*, the facts pleaded were not such as could afford any inference of criminality whatever; and therefore, if a divorce were to be pronounced upon proof of this allegation, it would in fact be a divorce on the mere confession of the party; but it is a known rule of the Canon Law, specifically set forth in the 105th Canon of the *English* Church, that marriages cannot be dissolved on the mere confession of the parties, otherwise it would be impossible to prevent the most gross collusion. That the confession was made when her mind was weakened by disorder, and may have been carried beyond the truth; and on her recovery she retracted it in great part, admitting only that she had been guilty of levities, not of actual criminality. Such a confession was of no avail to the other party, as nothing was a bar to a suit for restitution, which would not found a sentence of divorce. That as to the deed of separation, which was pleaded, the Court has always held, that such deeds did not alter the legal condition of the parties, and were never considered by this Court except as to Alimony.

 As

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As to the other facts, if the proof of them was too vague, nine years ago, to enable the husband to come into Court on the ground which he now assumes; the subsequent lapse of time must render that proof still more indistinct, and must make it more difficult for the wife to produce contrary proof in establishment of her innocence.

On the other side, Dr. *Jenner* and Dr. *J. Addams* contended, that, where the husband did not proceed originally, but was called upon for his defence against receiving his wife, a greater latitude of proof was allowed; or the wife might, by withholding her suit, 'till the witnesses against her were dead, defeat the just defence of the husband; that the rule, as to confession, was founded on the Canon Law *, and the words of it seemed to apply only to cases of divorce and nullity †: It would not, therefore, preclude the husband from the benefit of it, in resisting the prayer of the wife; that with respect to the inability to bring sufficient proof in 1811, as set forth in the allegation, it was introduced merely in explanation of the conduct of the husband, and would not preclude him from offering proof at the present time.

JUDGMENT,

Sir *William Scott.*—This allegation is given responsively in a suit for restitution of conjugal rights, and besides the formal articles pleading admitted facts (the marriage, the cohabitation of the husband and wife, and the intimacy formed by the wife with a Mr. *Young*, who resided near her

* X. 4. 19. 5. Glos. † *Gib.* Cod. 445. *Oughton*, t. 214.

 hus-

husband's house at *Blackheath*), it further pleads, in four articles, what I presume is intended as a defence against the application, and consists of a charge of adultery, which the husband proposes to establish against her. There is no prayer subjoined to the allegation; and the Court is left in the dark, so far as the allegation goes, with regard to its ultimate object; but I am led by the Counsel to suppose, that it will be for a separation *à mensâ et thoro*. If that be the intention, I have only to consider, whether the facts alleged will support such a prayer. If they should appear to fail of answering such a purpose, it may then be time to consider the inferior purpose, of inducing the Court, to refuse to lend its authority to the wife's application, for the return of her husband.

The first thing which the Court looks to, when a charge of adultery is preferred, is the date of the charge, relatively to the date of the criminal fact charged, and known by the Party; because, if the interval be very long between the date and knowledge of the fact, and the exhibition of them to this Court, It will be indisposed to relieve a party, who appears to have slumbered in sufficient comfort over them; and It will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, whether real or supposed, or a condonation of it. It, therefore, demands a full and satisfactory explanation of this delay, in order to take it out of the reach of such interpretations. The allegation before me is constructed with a view to this purpose of explanation; for it goes into a history of facts that led to the delay, and which, certainly, could not be all of them admitted, but for that purpose.—The fifth article pleads, first, an habitual intimacy between the parties, certainly of an unseemly

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seemly kind, running over a great number of circumstances from 1807 to 1811.—It is said, that this imposes a great difficulty upon the defence of the wife, for that it is almost impossible for her to construct a defence against a charge of such extent. How is she to be able to frame her defence against time, so as to shew the impossibility that such things could have taken place? The answer to that is, that if the charge is of habit and constant practice, it is just as easy to shew the contrary, namely, that no such habit and practice existed. She can cross-examine his witnesses; and she may produce witnesses of her own, to prove, that there were no such evening walks, no such "chambering and wanton-"ness," in short, nothing that raised in the minds of the witnesses a surmise of any thing improper. But it is said, there is a particular fact charged in a very loose way as to time. It is pleaded to have happened "in the latter end of 1810," that "the said *Alexander Young* and *Frances Mortimer* "were alone together in an upper room of a cer-"tain house, and that the said *Frances Mortimer* "was then observed to have her arm round the "neck of the said *Young*, and to be kissing him." She there can at least cross-examine. The Court will scrutinise with due strictness, and with fair allowance for all the difficulties of her case, and It might hardly deem such a fact, if it stood alone, sufficient to induce the Court to admit it; but after all, it is Its duty to consider, how the delay originated, so as to produce this laxity in description of time, and whether she herself has not, in a great degree, created the difficulty of which she now complains.

The sixth article states a confession, and it is a confession of a very particularly accredited nature, precise

precise in point of reference to time—extremely solemn in its form, and confirmed by acknowledgment and repetition.*

Now, I need not observe, that confession generally ranks high, or, I should say, highest in the scale of evidence. What is taken *pro confesso* is taken as indubitable truth. The plea of "Guilty" by the party accused shuts out all further inquiry. "*Habemus confitentem reum*" is demonstration; unless indirect motives can be assigned to it. This confession, however, does not admit, either in its own immediate circumstances, or in any conduct of the party, the possibility of any such motives. It is wrung from her by the strong emotions of her own mind *in articulo mortis*, at a moment when her declaration, made even against others, much more against herself, would be received upon the footing of sworn testimony. It is made to the party injured for the exoneration of a loaded conscience. It is confirmed, at her own desire, by the most solemn act of her religion. It is repeated, some time afterwards, to another person interested in knowing it, and with a reference to circumstances within the knowlege of that person, which had occurred on the very day to

* The article states, "that, in the month of *August* 1811, she was attacked with a very alarming illness; that she gave birth to a male child; that her life was despaired of; and that she sent for her husband, and said, that she could not die happy without confessing, that she had, for some time, carried on a criminal intercourse with Mr. *Young*; that she then felt much easier, and received the sacrament; and being still apprehensive of approaching dissolution, she repeated the same confession to Mrs. *C. Mortimer*, her sister-in-law, and recalled to her memory a certain day in 1808, when the crime was first committed."

which

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which the confession carried back the criminal act.

Two objections, however, are taken; first, that confessions alone will not support a charge of adultery, though they would support charges of a higher nature, such as treason, murder, &c.; and it is certainly true, that such is the letter of the Canon which guides the proceedings of this Court, and such is the interpretation which it has received. The more rational doctrine perhaps is, that confession, proved to the satisfaction of the Court to be perfectly free from all suspicion of a collusive purpose, might be sufficient to found a prayer for mere separation *a mensâ et thoro;* though not *pro dirimendo matrimonii vinculo,* so as to enable a party to fly to other connexions. The distinction is the more rational here; for certainly it would be a pretty harsh injunction of law to compel a man, whether he would or no, to live with a wife who had acknowledged her infidelity to his bed. And so the ancient Canon Law appears to have considered it, by recognising a difference of rule in the two different cases of absolute divorce, and of mere separation.* Such, likewise, is the distinction taken in the more ancient Canon † of this country. But the Canon ‡ now established, and as enforced by interpretations too literal and too numerous to be shaken, at this time of day, by any considerations of hardship (however justly urged), certainly has overlooked the distinction, and applied the rule indiscriminately to both cases: though *Oughton* § (an authority of no mean consideration, in matter of practice, in this Court) very reluctantly, if at

* X. 4. 19. 5.

† A. D. 1597.

‡ A. D. 1603. c. 105.

§ Tit. 214.

all,

all, submits to the construction; and appears to hold out, that if the Court, after all circumspection used, is satisfied of the sincerity of the confession, it ought to rest upon it as proof. In the present case the sincerity can be no matter of question. No motive of a desire *advolare ad alteras nuptias* can be suspected. She resists a separation at the very time; and what is she now attempting, but to re-establish her rights in this very marriage? However, it is not necessary to pursue the matter further upon this objection; for the party, in this case, does not rest his demand upon a confession alone. He pleads facts, to be supported by the testimony of others; and if these facts are merely proximate to acts of adultery, they may yet supply all the legal defect of a solitary confession.

A second objection is, that this confession was retracted; and that it is so admitted to have been in the succeeding article. Now this, which is argued to be a retractation, appears to me, on the contrary, to be little short of a recognition. It describes frequent intercourse unknown to the husband, as well at Mr. *Young's* house as at her husband's. It describes the unrestrained permission of indecent liberties with her person, and it then particularizes two occasions on which facts are described, which, it has been rightly observed, would have been considered by any accidental spectator, as direct proofs of the ultimate conclusion. It is rather too much for her to expect, that having advanced so very far as she did, the Court must stop short in Its conclusions, at the exact point, where she chooses to stop short in her narrative. The Court must draw Its consequences though

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though she disowns them. Retractation is not the term that one can apply to such an admission, even *if* taken singly by itself, without being confirmed and enlarged, as it is, by all that had passed before in her more solemn and sincere admissions.

The seventh and eighth articles plead the circumstance which led to the deed of separation, and the deed is exhibited. The objection taken against these articles is, that deeds of separation are not pleadable in the Ecclesiastical Court; and most certainly they are not, if pleaded as a bar to its further proceedings; for this Court considers a private separation as an illegal contract, implying a renunciation of stipulated duties — a dereliction of those mutual offices, which the parties are not at liberty to desert — an assumption of a false character, in both parties, contrary to the real *status personæ*, and to the obligations which both of them have contracted in the sight of God and man, to live together " till death them do part," and on which the solemnities both of civil society, and of religion, have stamped a binding authority, from which the parties cannot release themselves by any private act of their own, or for causes, which the law itself has not pronounced to be sufficient, and sufficiently proved. These Courts, therefore, to which the law has appropriated the right of adjudicating upon the nature of the matrimonial contract, have uniformly rejected such covenants, as insignificant in a plea of bar; and leave it to other Courts to enforce them, so far as they may deem proper, upon a more favourable view (if they entertain it) of their consistency with the principles of the

the matrimonial contract. As a plea in bar, therefore, this Court would be bound to reject it; but the truth is, that it is not offered here in that character. It is pleaded as a mere fact in the case, in a way historical and explanatory of the conduct of the parties; and in that character it is most material; for it contains a most satisfactory explanation of all the delay that is complained of, and likewise suggests very strong conclusions with respect to the truth of the facts charged upon the wife. It asserts, that the husband was prevented from instituting proceedings by not having other evidence of his wife's infidelity than her confession; or if he had more (such as he now engages to produce) under-rating in his own estimate the legal effect of it for obtaining a divorce. He communicated with her father, Mr. *St. Barbe*, "on "her *misconduct;*" a private separation was agreed upon; and she returned to live with her father, under a certain provision of maintenance from the husband, then agreed upon.

Now, nothing can be stronger to betray the real state of facts then existing, than that she should agree, and her father should agree, to a separation upon such a charge of *misconduct*, which could not have been, had it not been fully admitted in the consciousness of the one, and fully credited on the information received by the other. The feelings of honour on the part of the wife, and of affection on the part of the father, must otherwise have rebelled against such a proposition, founded on such a statement. However, the separation actually takes place, and the matter in consequence slumbers, at least in all public form, for years, during the lifetime of the father.

Upon

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Upon his death the husband suffers it to remain on the same footing; not so the wife, for she then becomes the aggressor, and calls for a restitution of her conjugal rights; and when he objects to this demand, upon the charges, which, with her consent and her father's, had been suffered to lie so long dormant, she cries out against the difficulties she is laid under for her defence, by the delay of proceeding to which she was as much a party as himself; and he has to fight up against the deficiencies of proof, that the lapse of so much time may have produced. In all probability that delay has been full as favourable to herself as it could be to him, and she perhaps now proceeds in the confidence that such must be its effect.

I shall, therefore, admit this allegation to proof *in toto;* and, I think, it not premature to say, that if it be proved to the extent in which it is laid, it will entitle the husband to a sentence of legal separation. What its effect may be as a mere bar to the present suit, if the proof falls short of that extent, I can better ascertain when I see how far it actually does fall short.

A counter-allegation was afterwards given in on the part of the wife, and witnesses were examined on both allegations. On 7th *December* 1821, the cause was ready for hearing, when it was settled between the parties, and both proctors declared, that they proceeded no further.

nature against the wife. It was submitted, therefore, that the Court would not admit the present libel, so as to put the woman on her trial.

Briggs v. Morgan.

21 June } 24 Nov. } 1820.

In support of the libel, Dr. *Jenner* and Dr. *Lushington* contended, that the objections were inconclusive. The acquiescence of the former husband could not be urged as affording any presumptions against the present case; he might acquiesce from motives of advantage to himself from the wife's fortune, or in the pursuit of his own personal indulgence. Many reasons might be assigned why he might not think fit to complain; this part of the history was, therefore, immaterial. As to the want of specification, it was sufficient that the plea was intelligible to the Court, so as to induce It to apply the usual modes of inquiry. In *Greenstreet* v. *Cumyns* *, a suit brought by the wife, the inspectors had declared, that they saw no necessary cause of disability; but the party admitted the fact, and the Court was satisfied. Such might be the result in this case, or if the party had any plea, that could be offered in answer to the matter of the libel, more particularly any thing proceeding from age, which was said to be so material, it ought to be set forth regularly. The Court would not presume past age, and the general description of the parties afforded no such presumption. It was a matter, at all events, that ought to be pleaded; and the wife was not entitled to defend herself in this way of general protestation, which furnished no answer to the complaint. It was trusted, therefore, that the Court would not refuse to admit the libel.

* Consist. 2d *Feb.* 1812. Vid. p. 332.

BRIGGS v. MORGAN.

21 June } 1820.
24 Nov. }

JUDGMENT.

Sir *William Scott.*—Cases of this kind, brought by the husband against the wife, are, certainly, not very frequent: It is said, that there have not been more than two instances, established by proof, in sixty years, which it requires no very deep physiology to account for. Real defects of this nature are not very common, I presume, in our own sex, and, probably, much more uncommon in the other. Where they do exist, parties will often be discreet enough to abstain from marriage entirely, or where a marriage has been contracted in ignorance of the defect, there may be many reasons,—some good, and some, perhaps, occasionally bad, which will operate to prevent the parties from making a public application to the Court, or a public disclosure of any kind. On the peculiar character of the present complaint, however, the possibility of such an occurrence, in point of fact, cannot be denied; and, in point of effect, upon the state of domestic life, it cannot be maintained, that the injury is not as great on the side of a husband, as of a wife; and that there is not the same ground of complaint in the fullest extent. It is known to form no small article of discussion in the canon law. When cases of this species do occur, they are, most certainly, cases of a most unpleasant nature to entertain for the purpose of judicial examination; but, I fear, that the Court is not invested with the privilege of selecting cases on grounds of personal feelings of delicacy. Courts of the highest jurisdiction in this country are, frequently, conversant in inquiries into transactions, most certainly, not of an amiable kind, and often en-

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tertain those of a most odious nature; and they are so compelled to proceed, where no suffering is to be relieved, but merely where punishment is to be inflicted: whereas here the question relates to a severe private injury received, and the proceeding is for relief and remedy,—a purpose, which has a much stronger claim on the attention of a Court.

In the case of *Harris* v. *Ball* *, the Judge, at that time, who is never to be mentioned here but in terms of the highest respect, dismissed the libel, for reasons that appeared to savour much more of moral delicacy than of legal solidity; but the Court of Delegates reversed this sentence †, holding, as it appeared, more correctly, that Courts are bound to exercise the jurisdiction which has been given them by law, and that they are not at liberty to decline it, merely because the cases are of a nature offensive to private delicacy; and That Court pursued that cause up to a final sentence.

Some objections have been taken to this libel, which are of that general nature, and therefore do not lead to any conclusion: these may be as generally dismissed. There are others of a more particular description, arising out of the particular circumstances of the case—as, that the woman had been long the wife of another man: though this may afford a very favourable presumption, it cannot be contended to be an estoppel of one man's complaint, that another did not complain, who might have had the same cause of complaint, but which, for private reasons, affecting his own

* Arches, 1788. † Deleg. 16th *July* 1789.

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Briggs v. Morgan.

21 June } 1820.
24 Nov. }

discretion, he did not think proper to bring forward. The objection, that the age of the parties is not set forth, is, I think, more material; since this Court, in different cases, has declined to proceed in suits where the parties are at an advanced period of life. It is said, that the man is of sound health; but if he chooses to take a wife of advanced age, he must take the consequences with her; and it would be better that private disappointment should be endured in such a case, than that the Court, and still more the Public, should have the annoyance (for annoyance it undoubtedly is), of having such suits forced upon It, for the relief of a person, who ought to have exercised his judgment at a much earlier time.

Under these considerations, the Court is disposed to admit the libel, but *not at present;* as It will allow the party charged an opportunity of stating any thing which she may have to offer, in the way of protest, that may induce the Court to decline proceeding further in such a case.

On 24th *November*, this cause came on again, for final hearing, on the affidavits of the parties.

JUDGMENT.

Sir *William Scott.*—This is a proceeding for nullity of marriage, by reason of the incurable impotence of the wife. The facts necessary to be stated are shortly these:—The parties were married in 1818; the wife being then, as it appears, a widow of fifty years of age—the man of forty-two. The woman had lived with a former husband eighteen years: they appear to have lived in great amity; and

GUEST *v.* SHIPLEY, FALSELY CALLING HERSELF GUEST.

5th *May* 1820.

Citation, in a suit of nullity of marriage, by reason of incurable impotence, not *sustained:* The complainant having confessed the validity of the marriage in former proceedings for divorce, by reason of adultery, against him.

IN this case, a citation was taken out, calling upon the woman to answer, in a suit of nullity of marriage, by reason of impotence, by mal-conformation in her person: An appearance was given for her, under protest; on the extension of which, and the answer of the man, in an act of Court, the matter was argued by Dr. *Arnold* and Dr. *Adams*, for the woman; and by Dr. *Lushington*, for the man.

JUDGMENT.

Sir *William Scott*.—This is a proceeding by *Thomas Douglas Guest*, to obtain a sentence of nullity of marriage, by reason of incurable impotence, arising from mal-conformation of his wife; a mal-conformation, which defeats the purposes for which the marriage contract is founded. Such cases are supposed to be physically possible, and the Court has occasionally received them; but, for reasons inherent in the nature of such causes, the Court is not disposed to encourage them, without an evident necessity; the proofs being such as are palpably against the modesty of the sex. In this case, it appears, that the parties were married in 1813; the wife had a considerable property, £14,000; of which £10,000 was property reserved to herself; as it does not appear, that the husband had any fortune. In the quality of her husband, under the marriage settlement, he has had the use of £4000, which furnishes a pretty strong inference, that there was no such objection to the marriage, as is now stated, since it is only in the character of a *lawful* husband, that he could

Guest *v.* Guest.

5th *May* 1820.

could entitle himself to the use of this money. It appears, that, within one month after the marriage, he was found by the wife in a situation with a maid-servant, whom he had introduced into her service, which, though it might not afford direct proof of adultery, was sufficient to raise her suspicion, and a suit was accordingly brought on the part of the wife.* The libel was given in after some time, which pleaded lawful marriage between the parties; and this plea was not opposed on the part of the husband. He had then the opportunity of controverting the fact, that he was not her lawful husband, on account of these natural obstructions, which would defeat the validity of the marriage; but he did not use that opportunity. His conduct, on that occasion, may be considered as an admission, that there was no such impediment to the marriage.

It is said, that the validity of the marriage was only an incidental point in such a suit; but it is the foundation of the whole proceeding. There can be no adultery, if there is no marriage; and it is always held, both here and at Common Law, that the first point to be proved is the marriage, which the other party may contest, and if he does not, the form of the sentence, in such cases, pronounces that there has been a true and lawful marriage, as well as a violation of it. I am of opinion, therefore, that this point has been an essential part of a suit, which this Court has determined; and that it is not in the power of the party now to bring it again before the Court,

* On 9th *February* 1816, in a suit of adultery brought by Mrs. *Guest* against her husband, an issue was given, confessing the marriage, otherwise contesting the suit negatively: Sentence was given in favour of the wife; and there was no appeal.

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even if there was no other objection to it. But the length of time which has elapsed, is, in itself, almost a bar; for I do not remember any instance, in which such a suit has been allowed to be instituted, after such an interval. That a period of seven years should be allowed to elapse in a case, where even a very short cohabitation would have sufficed for the discovery, is not allowed by any principle of law with which I am acquainted.

It has been said, that all this arose from the forbearance of the man; that he has no intention of obtaining money from the wife as is suggested; but that he colluded in the former proceedings, and submitted to the sentence, on the engagement of the wife's proctor, that he should not be subject to the costs. This is positively denied by the practiser in this Court, and it is highly improbable, that any practiser of this Court should so have conducted himself. The denial is completely supported by a person who was present at a conversation, which occurred in a proper way, while he attended, at the office of the proctor, for the purpose of identifying the man. I am quite satisfied, therefore, that there was no such engagement; if, however, the averment was true, it would be what he has now no right to allege, that he agreed to submit to a sentence, when he could have made a defence. The letters, which have been produced, contradictory to this, are of a *mendicant* kind; and there is also something of the appearance of threats, which forms part of the machinery in this shameful attempt to extort money. I am of opinion, that the wife has acted with becoming spirit in resisting such an attempt, and bringing this case before the Court.—I dismiss this suit with costs.

BRIGGS *v.* MORGAN.

21 *June* } 1820.
24 *Nov.* }

Nullity of marriage by reason of incurable impotence alleged against the wife, *not* sustained. The charge allowed to be repelled under the circumstances of *age*, &c. and by a denial, in the form of protestation, by affidavits.

THIS was a suit of nullity of marriage, brought by the man, "by reason of incurable natural "mal-conformation, and bodily defects in the per- "son of the woman." The libel also stated, that, at the time of the marriage, "the woman was a "widow, of the age of twenty-one years, and up- "wards."

On the admission of the libel, Dr. *Arnold* and Dr. *Phillimore* objected, that the circumstances, as stated, constituted a case which was unprecedented; that the woman being a widow at the time of marriage, raised a strong presumption against the truth of this complaint; that it might be different, if the former husband had died very early in the cohabitation, but there had been a cohabitation of eighteen years under that marriage; and that, in such a case, it was not sufficient to plead generally the impotence, as in the present libel, to put the party on the disgusting inquiry, which is the mode of proof in such cases, when brought in due time, and under credible circumstances. That the libel was defective in a matérial circumstance, in not setting forth the age of the parties in its statement; that the parties had lived together sixteen months, which was longer than might have been expected, if the case was really such as the libel described, and not long enough for the *triennalis cohabitatio,* which was required in cases of disability of another species. That there had been very few instances of suits of this nature

The Office of The Judge promoted by GILBERT *v.* BUZZARD and BOYER.

19 *July* } 1820.
8 *Nov.* }
4th *May* 1821.

Right of burial, in imperishable materials; how far restrained by considerations of public convenience: *Patent Iron Coffins*, the subject of the present question, admitted at an increased rate of payment to the parish.

THIS was a case of articles exhibited against the defendants, acting as Churchwardens of the parish of *St. Andrew, Holborn*, for preventing the interment of a parishioner in an iron coffin.

An allegation was now offered on the part of the Churchwardens, setting forth the circumstances of the parish, with respect to the number of the population, and the quantity of ground appropriated to the burial of the dead.

On the part of the promoter, Dr. *Arnold*, Dr. *Jenner*, and Dr. *Phillimore* objected, that the first article entered into the particulars of misconduct imputed to the parties employed in conducting this interment, but only with a view to embarrass and obstruct the main question, which related to the right of the executors to use their own discretion, in burying the deceased in any material, which they thought most proper. This was a discretion which had been constantly exercised, and without opposition. Stone, lead, wood, oak, or elm had been used indifferently. Under a late invention, iron had been used, with great advantage as to the means of securing the dead from being removed or disturbed, which was a subject of legal policy, and had been so considered in the Courts of Common Law.* To this invention great

* The King v. *Lynn*. 2 *T.R.* 733.

opposition

GILBERT v. BUZZARD and BOYER.

19 July } 8 Nov. } 1820. 4th May 1821.

opposition had been given; and the question for the decision of the Court was, whether that discretion was not matter of right, and freely to be exercised, without obstruction from the parish officers.

The ostensible ground of objection was, the apprehension of public inconvenience, in occupying a greater proportion of the burial grounds. In bulk, iron plate was less than wood, being only one-twelfth of an inch in thickness; and would, therefore, occupy less space than wood. It was said to be imperishable; but it is not more so than lead; and if the principle is admitted, it would be in the power of the Churchwardens to exercise an arbitrary control over all other articles, permitting only such as will soonest perish. It is conceived, that they have no such right; the church-yard is common to all parishioners for interment, but a particular spot being once assigned for the interment of a particular person, is severed or parted off, and appropriated, and the Churchwardens have no right to interfere with such occupation, by speculating on the perishing of the body once deposited, with a view to future interments in the same ground. To represent this right to the use of the common cemetery, as merely temporary, is contrary to the most received notions of propriety and to common feeling, as expressed in the popular language of mankind. The inviolability of sepulture is among the most ancient and universal rights; it is signified in corresponding forms of speech, as "*our last home—not to be disturbed*," &c. "*ut requiescat in pace usque ad resurrectionem* * ;" and consecration of such places is used, that they may rest secure from indignity. This

* 2 Inst. 489.

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an effective cohabitation with the former husband are clear and strong, both by the affidavit of the laundress, and of other persons; and if the Court is not deceived in the inferences to be drawn from them, it cannot be, as it is alleged, a case of natural mal-conformation; though it may be a case of supervening defect, which may happen to the most vigorous constitution, and when it does happen, is not a subject of legal relief: *subeunt morbi* is the natural description of late periods of life; and disorders, when they do come, at such periods, must be borne with.

The proofs relating to the former marriage, and to the harmony subsisting between the husband and wife, are attempted to be denied, in the affidavits offered on the part of the plaintiff, I think, without success. It has been attempted also to shew something like an irregular cohabitation of the former husband with other females, under a declaration, *that his wife was no wife for him.* This is a loose declaration, supported chiefly by the oath of the plaintiff, on hearsay, and by the sister of the former husband, who had been disappointed in the disposition of his fortune. I think, however, that this history is disproved; and that, though he might have had such connexions in early life, he quitted them on marriage, and never afterwards renewed them. This is another feature of insincerity, which strongly disinclines the Court from proceeding further in this case. Under such circumstances, the Court will not think itself justified in exposing a woman of this advanced age to the only proofs (certainly of an offensive nature), by which the alleged defect can be satisfactorily established. It will not wade further

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BRIGGS *v.* MORGAN.

21 *June* } 24 *Nov.* } 1820.

into the history of these parties. If the husband is seriously convinced, that he is entitled to this relief, he must seek it, by appeal, in the Superior Court; but I will not compel the woman to submit to this process.—Woman dismissed.

1st *Aug.* 1821.

In another case of the same kind, the Court, upon the report of Sir *Astley Cooper*, Mr. *Thomas*, and Dr. *Key*, which was read *in camerâ*, pronounced the case proved, and signed the sentence of nullity.

2d *Feb.* 1812.

Vide supra, p. 325.

In the case of GREENSTREET, falsely called CUMYNS, *v.* CUMYNS; which was a suit of nullity of marriage, instituted by the woman, by reason of incurable impotence on the part of the man.

JUDGMENT.

Sir *William Scott.*—I think there is enough to satisfy the Court, that, at the time when this marriage took place, there was incompetency, on the part of the man, to perform the duties of marriage; a capacity to perform which is necessary to render it valid. The Court is, upon the whole, satisfied of the existence of this fact, and that there has been no collusion between the parties. There is an air of truth and sincerity in the evidence; and the party appears willing to compensate, as far as is in his power, the injury which he states he has ignorantly done.—The Court pronounced the sentence of nullity.

and it is no small proof, that he thought he had no right of complaint, that he left her the whole of his substance at his death; and no proceedings were established, by the present husband, before *March* 1820—the libel not being given in 'till last *June*, *sixteen months after the marriage.* It pleads "*defect incurable, as by inspection of* "*matrons will further appear.*" When the libel was debated on a former day, the Court was disposed to hold it to be admissible, giving, however, the party an opportunity of offering, by way of protest, any special matter that she might wish to address to the consideration of the Court, in that stage of the cause, before It hurried on to a decisive inquiry. Affidavits have, accordingly, been given in on both sides; and the Court has now the unpleasant task of deciding upon them. It cannot be concealed, that cases of this description are necessarily attended with serious mischiefs to parties, in the disappointment of very laudable or allowable purposes of marriage—the desire of having children, and the lawful enjoyment of each other's person. Such cases of disappointment, so originating, may not be frequent; but when any such occurs, it is a subject, which the Court is bound to entertain, and to treat according to the ordinary modes of investigating the truth of the complaint, for the relief of the injured party.

The usual mode of proof is, without question, liable to strong objections, on the ground of indelicacy, but it is the only effectual mode of proof; and the Court has already observed, that It cannot, from feelings of delicacy alone, turn aside from it, if necessary, for such a result. These are, however, rules adapted to cases brought forward

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ward with sincere motives, and under circumstances, in which the consequences may be supposed to inflict a real injury and disappointment on the party. Different considerations have been applied to persons of advanced age, and to those of an earlier period of life, with great reason and propriety. In the case of young persons, the injury is greater; in age more advanced, the mode of inquiry is less conclusive, and probably still more abhorrent to the feelings of the party, who is exposed to it. On considerations of this kind, the Court required, that the age of the party might be stated before the libel was admitted.

It now appears, from the statements which have been introduced, that the woman was fifty years of age at the time of this marriage, rather beyond the crisis when the expectation of children can reasonably be entertained, and more particularly in the case of a woman, who had been married many years before, and had no children. The age of the man is not much a subject of observation, except that it is beyond the *octavum lustrum*, at which an experienced writer describes the passions to be in a state of greater composure; at any rate, it is an age, at which the disappointment on that account may be presumed less grievous, especially in the case of a marriage to a woman older than himself. This is not the only symptom of insincerity in the present complaint. There is the delay of sixteen months, which is not easily accounted for, in a case in which the proof of continued cohabitation is not required; for in a case of actual mal-conformation no such proof is required. The party, according to his own description of the case, might have made his application at a much earlier period. The proofs of

an effective cohabitation with the former husband are clear and strong, both by the affidavit of the laundress, and of other persons; and if the Court is not deceived in the inferences to be drawn from them, it cannot be, as it is alleged, a case of natural mal-conformation; though it may be a case of supervening defect, which may happen to the most vigorous constitution, and when it does happen, is not a subject of legal relief: *veniunt morbi* is the natural description of late periods of life; and disorders, when they do come, at such periods, must be borne with.

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JUDGMENT.

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Gilbert v. Bizzard and Boyer.

19 July } 1820. 8 Nov. }
4th May 1821.

on special terms vested in trustees, and accessible only on higher fees—and they are not large; and that, from this alteration in the mode of interment, if it should be generally adopted, the ground would soon become useless, and the parish could not procure more, but at a considerable distance from the church, or even from the parish, which would be attended with great inconvenience and expence to the inhabitants, in the mode of conducting funerals.

It is said, that the churchwardens are not to speculate on future inconvenience; but that is advanced without authority. If a great inconvenience is reasonably certain to ensue, it could not be wrong in the parish officers to interfere, and warn the parties, that the interment could not be permitted, in this form. The ground might, otherwise, be closed up, as was necessary at *Bristol*, being dangerous to the health of the city. It is said, that the dimensions are actually smaller than those of wood, in the present invention; but others may increase, and who is to keep a perpetual check upon them. Other metallic substances may be adopted, such as cast iron, which would be still more imperishable. It may be true, that stone has been used, but not frequently; and lead, but not commonly, and chiefly in vaults, at additional fees, which prevent the common use of it. In *London*, lead is forbidden, yet *here* a more imperishable metal is claimed to be used, as of common right. It is asked, where the restriction is to stop? If a novel and inconvenient mode is introduced, contrary to the will of the parishioners, the Court will have the power to restrict it; as is usually done in respect to vaults, which are not granted, but with the consent of the parishioners,

 and

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and by the authority of the Ordinary. Agreeably to this principle, it appeared to be the unanimous opinion of the Judges of the King's Bench, on a late application which was made to that Court, in this case *, that it was a matter of ecclesiastical cognizance, and properly subject to the regulation of this Court. This power has been at all times exercised in analogous cases, either by restraining the permission, or by modifying the use of it by proportionate fees; and it is trusted, that the Court will see the necessity of interfering, to prevent so great an inconvenience, as must be occasioned, by the general use of this novel mode of burial, in populous parishes.

JUDGMENT.

8th Nov. 1820.

Sir *William Scott*.—This suit is brought by *John Gilbert*, parishioner of *Saint Andrew's, Holborn*, against *John Buzzard* and *William Boyer*, churchwardens of that parish, for the offence of obstructing the interment of his wife, *Mary Gilbert*. The criminating articles state, in substance—that she was likewise a parishioner, and died on the 2d of *March* 1819; that her body was deposited in an iron coffin, and proper notice given of the intended interment, and the usual fees paid for *such a burial;* but that the Churchwardens prevented, by force, the burial from taking place; and, in consequence thereof, the body was deposited in the bone-house, where it remains. That the iron coffin would take up less space than a wooden one; and is so constructed, as to prevent the body from being taken out. That again, on the 14th of *April*,

* 2 *Barnewell* and *Alderson*, p. 806.

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in the present year, a written notice was given to the Rector, Churchwardens, and Sexton, of an intended funeral on the 18th, and a written answer returned, by the Churchwardens, that they would not permit it. That the demand of interment was actually made on the day mentioned; but that the Churchwardens refused to permit the interment, unless the body was taken out of the iron coffin; and forbad any grave to be prepared for its reception.

The defensive allegation states in substance,—That the account given by the promoter misrepresents the transactions:—that nothing was said by *Gilbert*, on his first application, about an iron coffin, though he was *then* informed, that the parish would not receive one; but that he said it was to be of *wood*. He paid the usual fees, and not 'till then declared *it was to be of iron*, and refused to take back the fees. That a Select Vestry, which governs the parish concerns, being assembled, took the subject into consideration, and passed a resolution not to admit the iron coffin; and a copy of such resolution was served upon the undertaker. That, on the 9th of *March*, a forcible entry was made into the church-yard, and a great disturbance took place, by a tumultuous demand for the body, and for its interment; but the burial was not permitted to take place, and the body remains in the bone-house. That the parish is very large and populous, containing an increasing population of 30,000 persons—that the annual burials are above 800, and are increasing—that they have three burial grounds, besides the church-yard, all nearly filled with corpses. That they

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would soon be rendered useless by the introduction of iron coffins; that it is impossible to obtain new burial grounds, but at an enormous expence, and with grievous inconvenience. That their proceedings had been all guided and authorized by the Select Vestry, and by the parish at large.

The suit appears to have begun under strong feelings of mutual irritation, which have now properly subsided; and the parties have agreed to take the opinion of the Court upon the dry question of right, without introducing into it, any imputation of misconduct on either side, or engrafting upon it any demand of penalties to be inflicted, or costs to be decreed. In this act of amnesty the Court willingly concurs, and therefore forbears to repeat any observations upon the strange wanderings, into which the case has strayed, since the transaction happened, which appears now in its regular form of proceeding.

Before entering into the immediate question, it may not be entirely useless or foreign to remark, that the most ancient modes of disposing of the bodies of the dead mentioned by history, are by burial or by burning, of which the former appears to be the more ancient. Many proofs of this occur in the sacred history of the patriarchal ages, in which places of sepulture appear to have been objects of anxious acquirement, and the use of them is distinctly and repeatedly recorded. The example of the Divine Founder of our religion in the immediate disposal of his own person, imitated by that of his disciples and followers, has confirmed the indulgence of that natural feeling, which appears to prevail, against the instant and entire

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entire dispersion of the body by fire, and has very generally established sepulture, as the customary practice of christian nations. Sir *Thomas Brown* thus expresses himself, in his quaint but energetic manner, in his treatise upon urn-burial. "Men "have been fantastical in the singular contrivances "of their corporal dissolution; but the soberest "nations have rested on two ways, inhumation "and burning. That interment is of the elder "date, the examples of *Abraham* and the Pa-"triarchs are sufficient to illustrate; but Chris-"tians have abhorred the way of obsequies by "fire, and though they sticked not to give their "bodies to be burnt in their lives, detested that "mode after death, affecting rather a depositure "than an absumption, and conforming themselves "to the will of God, which required them to "return again, not to ashes, but unto dust."— "But burning was not fully disused 'till Christianity "was finally established, which gave the final ex-"tinction to these sepulchral bonfires." *

The mode of depositing in the earth has, however, itself varied in the practice of nations. "*Mihi quidem*," says *Cicero*, "*antiquissimum sepul-"turæ genus id videtur fuisse, quo apud Xenophon-"tem Cyrus utitur.*" † That great man is made by his historian to declare, in his celebrated dying speech, "that he desired to be buried "neither in gold nor in silver, nor in any thing "else, but to be immediately returned to the "earth; for what," says he, "can be more blessed, "than to mix at once with that which produceth

* C. 1 & 2.

† Cic. de legibus, lib. 2. s. 22.

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"and nourisheth every thing excellent and bene-"cial to mankind." There certainly, however, occurs very ancient mention (indeed the passage itself rather insinuates the same indirectly) of sepulchral chests, or what we call coffins, in which the bodies being inclosed, were deposited so as not to come into immediate contact with the earth. It is recorded specially of the patriarch *Joseph*, that "when he died, *he was put into a coffin and em-"balmed*;" both of these being, perhaps, marks of distinction to a person, who had acquired high and merited honours in that country. It is thought to be strongly intimated by several passages in the sacred writings, both old and new, that the use of coffins, in our meaning of the word, as *inclosing chests* deposited in the earth, was not familiar amongst the Jews; and it is an opinion not lightly entertained by some of the Learned, that such was the case likewise in the practice of the Greeks and the Romans. It is some confirmation of that opinion, that there is, perhaps, no word in the language of either of them, that is exactly synonymous with our word coffin, though the word itself is borrowed from both languages, though in another signification.* The Grecian terms usually adduced referring rather to the *feretrum* or bier on which the body was conveyed, than to a chest, or trunk, in which it was shut up; and the Roman terms are either of the like signification, or are mere general words (such as *arca*, *loculus*, and the like) without any funeral meaning, and without implying

* Κόφινος — *Cophinus* fœnumque supellex. Juv. iii. 14. In both languages the word signifies a *basket*.

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any final destination of the substances which compose them, to a deposition in the earth along with a human body.

The practice of sepulture has also varied with respect to the places where performed.—In ancient times caves seem to have been in high request—then gardens, or other private demesnes of proprietors—inclosed spaces out of the walls of towns—or by the sides of roads (*siste viator*)—and finally, in Christian countries, churches and church-yards, where the deceased could receive the pious and charitable wishes of the Faithful, who resorted thither on the various calls of public worship.* In our own country, the practice of burying in churches is said to be anterior to that of burying in, what are now called, church-yards, but was reserved for persons of pre-eminent sanctity of life. Men of less memorable merit were buried in inclosed places not connected with the sacred edifices themselves. But a connexion, imported from *Rome* by *Cuthbert*, Archbishop of *Canterbury*, took place about the year 750; and spaces of ground adjoining the churches were carefully inclosed, and solemnly consecrated, and appropriated to the burials of those, who had been entitled to attend Divine Service in those churches; and who now became entitled to render back into those places their remains to earth, the common mother of mankind, without payment for the ground which they were to occupy, or for the pious offices which solemnized the act of interment.

In what way the mortal remains are to be conveyed to the grave, and there deposited, I do not

* Vid. *Hericourt* Loix Eccl. p. 504.

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find any positive rule of law, or of religion, that prescribes. The authority under which the received practices exist, is to be found in our manners, rather than in our laws—they have their origin in natural sentiments of public decency and private affection—they are ratified by common usage and consent; and being attached to a subject of the gravest and most impressive nature, remain unaltered by private caprice and fancy, amidst all the giddy revolutions that are perpetually varying the modes, and fashions, that belong to the lighter circumstances of human life. That bodies should be carried in a state of naked exposure to the grave, would be a real offence to the living, as well as an apparent indignity to the dead. Some *involucra*, or coverings, have been deemed necessary, in all civilized and christian countries; but chests or trunks containing the bodies, descending along with them into the grave, and remaining there till their own decay, cannot plead either the same necessity, nor the same general use.

I have already mentioned three nations of antiquity, two of them highly polished, in which such a practice is reasonably supposed not to have been familiar. In the eastern-parts of modern *Europe*, the Christians, generally members of the *Greek* church, as well as their *Mahometan* masters, the *Turks*, are carried upon open biers, and from thence descend, in their shrouds, or funeral vestments only, into their graves. Such is likewise the general practice of *Asia*, in those parts where the practice of burning does not continue to exist. Such is also represented to be the mode of interment in the great *European* establishments of *South America*.

America. In *Western* and *Northern Europe*, the use of sepulchral chests has been more general. In our own times, an attempt was made by a great *European* Sovereign * to abolish the use of them in his *Italian* dominions. The attempt was much applauded by some philosophers, on the physical ground, that the dissolution of bodies would be accelerated, and the dangerous virulence of the fermentation disarmed, by a speedy absorption of the noxious particles into the surrounding soil. Whatever might be the truth of this theory, the measure was unfortunately accompanied by regulations which prescribed, that bodies of every age, and of both sexes, and of all ranks and conditions, and of every species of mortal disease, however hideous and loathsome, should be brought out, naked from the houses, and tumbled into a night-cart at the sound of a bell, and conveyed to a pit, beyond the city walls, there to rot in one common mass of undistinguished putrefaction — regulations which, as might have been foreseen, were so strongly encountered by the natural feelings, and established habits, of a highly civilized and polished people, that it was found necessary, at no great distance of time, to bury the edict itself, by a total revocation.

In our own country, the use of coffins is extremely ancient, though, most probably, by no means general.—They are actually found of great antiquity, of various forms, and of various materials — of wood — of stone — of metals — of marble — and even of glass.† *Coffins*, says Dr. Johnson,

* *Leopold*, G. D. of *Tuscany*, A. D. 1786. Vid. Ann. Reg. vol. xxviii. p. 41.

† *Vid.* Gough's Sepulchral Monuments.

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Johnson, in his explication of the word, *are made of wood and various other matters.* From the original expence of some of these materials, or from the labour requisite in the preparation of them for this use, or from both, it is evident that most, if not all of them, must have been occupied by persons who had filled the loftier stations of life. In modern practice, chests or coffins of wood or lead, or both, are commonly used by persons who can afford to pay for them — for persons in abject poverty (whom the civil law technically calls the *miserabiliter egeni*), what is called *a shell*, and which, I understand, to be an imperfect coffin, and is successively used for different individuals, in some very populous parishes; unless public or private charity supplies something better as the vehicle. Persons dying at sea are, I believe, not unfrequently consigned to the deep, wrapped up in their hammocks or sleeping beds — but I know not, that any of these are nominatim or directly required, by any authority whatever.

A statute of *Charles* 2d. * requires, that coffins shall be lined with woollen, but it does not require, that coffins shall be used. It is to be observed, that in the funeral service of the Church of *England*, there is no mention, indeed, there is rather an apparently studious avoidance of any mention, of coffins. It is throughout the whole service, the *corpse* or the *body*. The officiating priest is to meet the *corpse* at the gate of the churchyard — at a certain part of the service, dust is directed to be thrown, not upon the *coffin*, upon the *body*.

* 30 Car. 2. st. 1. c. 3. s. 3.

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In another part, certain portions of holy writ, or of pious admonition, are to be recited, whilst the *corpse* is making ready to be put into the grave. I observe likewise, that, in old tables of burial fees, a distinction of payment is made for *coffined* funerals and *uncoffined* funerals. There is one of 1627, exhibited by Sir *H. Spelman* in his Tract *de Sepulturâ*, in which a certain sum is charged for a *coffined funeral*, and about half that sum for an *uncoffined funeral*, and expressly under those descriptions.* From which I draw this conclusion of fact—that *uncoffined* funerals were, at that time, by no means so unfrequent as not to require a particular notice and provision. I think, I might also venture to deduce this conclusion, a conclusion by no means impertinent to the present enquiry, that, even at that time it was recognized as not unjust, that where the deceased, by the use of his coffin, took a longer occupancy of the ground, he should compensate the parish by an increased payment.

* A vestry constitution, 24 Nov. 1627.—25 April 1628. Whoever shall be buried in the chancel, shall pay to the parish as shall be agreed:

	Coffined.	Uncoffined.
For interring the corpse - - -	0 10 0	
In the isles of the chancel,		
To the churchwardens for the ground - -	1 6 8	
To the parson for interring the corpse - -	0 6 8	
In the body of the church,		
To the churchwardens for the ground - -	1 0 0	
To the parson for interring the corpse - -	0 6 8	
In the churchyard,		
To the parson for interring the corpse	2 8	0 1 4
To him in like manner for every child under 7 years - - -	0 2 8	0 1 4

All these double for every stranger.

Spelman's Works p. 185.

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The argument, therefore, that rests the right of admission for particular coffins, upon the naked right of the parishioner to be buried in his parish churchyard, seems to stop short of that which is requisite to be proved, the right of being buried in a large chest or trunk of any materials, metallic, or other, which his executors may think fit. The rule of law which says, that a man has a right to be buried in his own churchyard, is to be found, most certainly, in many of our authoritative text writers; but it is not quite so easy to find the rule, which gives him the right of burying a large chest or trunk in company with himself.—That is no part of his original and absolute right, nor is it necessarily involved in it.—That right, strictly taken, is to be returned to his parent earth for dissolution, and to be carried thither in a decent and inoffensive manner. When these purposes are answered, his rights are, perhaps, fully satisfied in the strict sense in which any claim, in the nature of an absolute right, can be deemed to extend. At the same time, it is not to be denied, that very natural feelings prompt to something beyond this—to a continuation of the frame of the body, beyond its immediate consignment to the grave. An indulgence of such feelings, highly allowable in themselves, naturally enough engrafts itself upon the original right, so as to appear inseparably connected with it, in countries where the practice has been habitually indulged; for, however men may feel, or affect to feel, an indifference about the fate of their own remains, few have firmness, or rather hardness of mind sufficient, to contemplate, without pain, the total and immediate extinction of the remains

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of those, who were justly dear to them when living. A sentiment of this kind has been supposed, as I have intimated, to have led in part to a preference of burial to the process of burning. It has likewise given birth to extravagant means for preserving human remains, for a period of time long after the term, at which any memory of the individuals, or any affection of their survivors, can be supposed to extend. — Amongst such extravagancies, the use of coffins is, certainly, not to be numbered; they are merely temporary themselves, though of much longer duration than is necessary for their primary intention, that of preserving the body from the ravages of the reptiles of the earth, if any such ravages are at all to be apprehended. In later times, and in populous cities, ravages of a more formidable kind are to be dreaded, against which they afford no security. — Those of the persons engaged in the employment of furnishing bodies for dissection; an employment which, whatever be its necessity, is, certainly, not conducted without lamentable violation of natural feelings, and occasionally of public decency itself.

It is particularly, I presume, with a view to prevent such spoliations of the dead, that the use of iron coffins is pressed, in this application to the Court. — The purpose of security against such spoliations is, I understand, proposed to be effected, by some ingenious mechanical contrivance, which prevents the coffins from being opened, when once effectually closed. — I do not find that any objection is taken to the contrivance itself, on the ground of inefficiency, or on any other. —

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The objection is to the metal, iron, of which the whole coffin is composed; and I *must* say, that knowing of no rule of law, that prescribes coffins, and, certainly, of none which prescribes wooden coffins exclusively, and knowing that modern and frequent usage admits coffins of lead, a metal much more indestructible than iron, I find some difficulty in pronouncing, that the use of this latter metal is clearly, and universally, unlawful in the structure of coffins; and that coffins so composed are inadmissible, upon any terms whatever.—Such coffins, being composed of thin laminæ, occupy, as I presume, and as I see it is alleged, rather less space than those of wood itself.—There is no objection, therefore, on that ground; and the objection, that they may be magnified to any size however inconvenient, seems to apply to coffins, composed of this substance, not at all more than to those of any other.—The real truth is, that the claim, on the part of these coffins, which is quarrelled with, is neither more nor less than this, that they shall be admitted upon the same terms of pecuniary payment as those of wood.—This claim cannot, I think, be reasonably urged, but under shelter of one of two propositions—Either that there is no difference in the duration of coffins of wood and those of iron, or that the difference of duration ought to make no difference, in the pecuniary terms of admission.

Upon the first of these questions, that of comparative duration, a wish was expressed by the Court, that It might be assisted by opinions obtained from persons, more scientifically conversant with such subjects, than I can describe myself to be

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be — but being left to my own unassisted apprehensions, on such a matter, I must confess, that it was not without a violent revolt of every notion, that I entertain, that I heard it rather insinuated in argument than directly asserted, or maintained, that iron coffins do not keep a longer possession of the ground than those of wood. — To me it appears, without any experimental knowledge that I can claim, that, upon all common theory, it must be otherwise.—Rust is the process by which iron travels to its decomposition. — If an iron coffin deposited in the earth contracts no rust at all, from want of air or moisture, in that case it preserves its integrity unimpaired. But if, from the moisture of the soil in which it is deposited, or from the access of a little air, it contracts rust, That rust, until it scales off, forms an external covering which protects the interior parts, and retards their decomposition; whereas the decay of the external parts of the wood propagates inwardly its corruption, and promotes, and hastens, the dissolution of the whole.—It is the fault of the party complainant, if, being left to judge upon this matter without sufficient information, I judge amiss in holding, that coffins of iron are much more durable than those of wood.

It being assumed, that the Court is justified in holding this opinion, upon the fact of comparative duration; the pretensions of these coffins to an admission upon the same pecuniary terms as those of wood, must resort to the other proposition, which declares, that the difference of duration ought to produce no difference in those terms. Accordingly it has been argued, that the ground once

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once given to the body is appropriated to it for ever — it is literally in mortmain unalienably,—it is not only the *domus ultima*, but the *domus æterna*, of that tenant, who is never to be disturbed, be his condition what it may — the introduction of another body into that lodgement at any time, however distant, is an unwarrantable intrusion. — If these positions be true, it certainly follows, that the question of comparative duration sinks into utter insignificance.

In support of them, it seems to be assumed, that the tenant himself is imperishable; for, surely, there can be no inextinguishable title, no perpetuity of possession, belonging to a subject which itself is perishable. — But the fact is, that "*man*" and "*for ever*" are terms quite incompatible in any state of his existence, dead or living, in this world: —The time must come when "*ipsæ periere ruinæ*," when the posthumous remains must mingle with, and compose a part of, that soil, in which they have been deposited. — Precious embalments, and costly monuments may preserve, for a long time, the remains of those who have filled the more commanding stations of human life — but the common lot of mankind furnishes no such means of conservation. — With reference to them, the *domus æterna* is a mere flourish of rhetoric; the process of nature will speedily resolve them into an intimate mixture with their kindred dust; and their dust will help to furnish a place of repose for other occupants in succession. It is objected, that no precise time can be fixed, at which the mortal remains, and the chest which contains them, shall undergo the complete process of dissolution

lution; and it certainly cannot; being dependent upon circumstances that vary, upon difference, of soils, and exposures, of seasons and climates; but observation can ascertain them sufficiently for practical use. The experience of not many years is required to furnish a sufficient certainty for such a purpose.

Founded on such facts and considerations, the legal doctrine certainly is, and has remained unaffected — that the common cemetery is not *res unius ætatis*, the property of one generation now departed, but is, likewise, the common property of the living, and of generations yet unborn, and is subject only to temporary appropriations. There exists in the whole a right of succession, which can be lawfully obstructed only in a portion of it, by public authority, that of the Ecclesiastical Magistrate, who gives occasionally an exclusive title, in such portion, to the succession of some family, or to an individual, who has a fair claim to be favoured by such a distinction; and this, not without a just consideration of its expedience, and a due attention to the objections of those, who oppose such an alienation from the common property. Even a bricked grave, granted without such an authority, is an aggression upon the common freehold interests, and carries the pretensions of the dead to an extent, that violates the rights of the living.

If this view of the matter be just, all contrivances that, whether intentionally or not, prolong the time of dissolution beyond the period, at which the common local understanding and usage have fixed it, is an act of injustice, unless compensated in some way or other. In country parishes, where the

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the population is small, and the cemetery is large, it is a matter less worthy of consideration: more ground can be spared, and less is wanted; but, in populous parishes, in large and crowded cities, the indulgence of an exclusive possession is, unavoidably, limited; for, unless limited, evils of most formidable magnitude take place. Church-yards cannot be made commensurate to the demands of a large and increasing population; the period of decay and dissolution does not arrive fast enough, in the accustomed mode of depositing bodies in the earth, to evacuate the ground for the use of succeeding claimants: new cemeteries must be purchased at an enormous expence to the parish, and to be used at an increased expence to families, and at the inconvenience of their being compelled to resort to very incommodious distances for attendance on the offices of interment.

In this very parish, three additional burial grounds are alleged to have been purchased, and to be now nearly filled. This is the progress of things in their ordinary course, and if to this is to be added the general introduction of a new mode of interment, which is to ensure to bodies a much longer possession, the evil will become intolerable, and a comparately small portion of the dead will shoulder out the living and their posterity. The whole environs of this metropolis will be surrounded with a circumvallation of church-yards, perpetually increasing, by becoming themselves surcharged with bodies, if, indeed, land owners can be found, who will be willing to divert their ground from the beneficial uses of the living to the barren preservation of the dead, contrary to the humane maxim

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quoted by *Tully* from *Plato's Republic*:—" Quæ " terra fruges ferre, et, ut mater, cibos, suppedi- " tare possit, eam ne quis nobis minuat, *neve vivus* " *neve mortuus*." *

If, therefore, these iron coffins are to bring additional charge and trouble upon the parish, they ought to bring with them a proportionable compensation. Upon all common principles of estimated value, you must pay proportionably for the longer lease which you take of the ground— to this condition coffins of lead are subjected, and what is the exemption to be pleaded for iron? If you wish to protect your deceased relatives by additional securities, which press upon the convenience of the parish, we do not blame the purpose, nor reject the measure, but it is *you*, and not the *parish*, who must pay the whole of the charge imposed. I am aware, as I have already intimated, that very ancient Canons forbid the taking of money upon interment, upon the notion, that consecrated grounds are amongst the *res sacræ*, and that money payments for them were, therefore, acts of a simoniacal complexion; but this has not been the way of considering that matter since the Reformation, for the practice goes up at least nearly as far; it appears founded upon reasonable considerations, and is subjected to the proper controul of an authority of inspection. In populous parishes, where funerals are very frequent, the expence of keeping church-yards in an orderly and seemly condition, is not small, and that of purchasing new ones, when the old ones become

* Cic. de Legibus, tit. 2. s. 27.

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surcharged, is extremely oppressive. To answer such charges both certain and contingent, it surely is not unreasonable, that the actual use should contribute when it is called for—at the same time, the parishes are not left to carve for themselves in imposing these rates, they are all submitted to the examination of the Ordinary, who exercises his judgment, and expresses the result by a confirmation of their propriety in terms of very guarded caution. It is, perhaps, not easy to say where the authority could be more properly lodged, or more conveniently exercised.

Having, I think, sufficiently declared, in these observations, my opinion generally upon the subject, I am not aware that much more remains, than that I should direct the parish to compose a table of fees, for the consideration of the Ordinary. It will be for their own consideration, in the first instance, how far these coffins should be put upon the same footing as those of lead. It is certain, that they occupy less room, and that they are more temporary in duration, but it is, likewise, to be remembered, that being much more accessible in point of original expence, they are, therefore, likely to be much more numerous; they are more likely, on that account, to transmute the cemetery into a mine of iron, than there is any hazard of its being converted into a mine of lead. It may be said, that imposition of high fees may, in effect, operate as a prohibition in populous parishes, and crowded church-yards,—to which I answer, that, even if such an effect should follow, it is better, than that a parish should be robbed of the fair and convenient use of their own public cemetery.

Patent rights (under which I understand these coffins are constructed) must be held by the same tenure as all other rights. *Ita utere jure tuo alienum ne lædas* they must not trench upon rights more ancient, more public, and such as this Court is peculiarly bound to protect.

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In the meantime I recommend, that the body, which has lain so long unhonoured, should be committed to the grave without obstruction, but without prejudice to the present question, or to the rights of the parish. No public prohibitory resolution had passed at the time of the death, and I willingly lay hold of that circumstance to recommend a measure of peace towards the living, and of charity towards the dead.

I shall admit affidavits, on both sides, before any table of fees is confirmed.

On a subsequent day, this cause came on again, on the explanations permitted to be offered on affidavits, as above directed by the Court; and Counsel were heard on the effect of those explanations.

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JUDGMENT.

Sir *William Scott*.—The general determination, which I have already arrived at, has decided the legal question, (so far as my opinion could decide it) that if iron coffins were more durable than those of wood, they ought to pay in proportion to their longer occupation of the ground. The question of fact, that it was more durable, remained in a controverted state, to be ascertained (so far

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as it could be ascertained) by further evidence to be produced; and I need not add, that to reach any thing like exactness upon such a subject of comparison, was an expectation not to be indulged. The fact itself is liable to be affected and varied, by the influence of various causes acting upon both substances, so as to make any general result, even of experiments themselves, in some degree questionable. But the truth is, that such experiments have not been, and cannot be made, in any time convenient for the present decision of the question. The whole of the illustration which it has received, is derived from the opinions of persons scientifically conversant with such subjects, and from such exhibition of facts, as may have occasionally, and incidentally, presented themselves to notice.

Of the former of these species of evidence, the Court is furnished with the declared opinions of eminent professors of the science of chymistry; and I should have been happy to have been able to apply, confidently, the safe and convenient judicial aphorism of "*Peritis in arte suâ credendum;*" but, where such opinions disagree, a matter of no unfrequent occurrence, that rule can have no application, and it is a work of no small difficulty to provide another. The Court cannot presume to pronounce directly a decisive judgment, on a subject, which the conflicting opinions of those, who understand it most familiarly, have left in the state of doubt in which they found it; still less can It presume to decide another comparative question, of perhaps equal difficulty, and, certainly, increased delicacy, that of the skill,

and

and experience, and judgment of the different professors. It can proceed merely "*crassâ Mi-*" "*nervâ*, in looking to the opposing numbers of opinions; for the arguments by which they are supported, however just, come too little within the reach of its comprehension, to authorize any dogmatical conclusion. The balance of numbers is, certainly, on the side of the greater durability of iron, and, therefore, (*primâ facie* at least) the balance of authority; for supposing merely an equality of individual skill and judgment, it must be the number that should decide the weight of aggregate authority.

Having already, at the former hearing, expressed a pretty strong inclination of my own judgment, (a very uninformed one, undoubtedly,) on the greater durability of iron, I may, perhaps, be thought to be unduly influenced by my own prepossessions, when I say, that the opinions of Mr. *Brande*, who fixes the proportions of durability of iron to wood as three to one, and Mr. *Aikin* and the two other persons who concur, find a readier way to the conviction of my own mind, than those of their opponents. However that may be, the opinion of the Court, upon this matter, rests finally with them, so far as this species of evidence can lead it.

Another test, by no means improper to be noticed, has been suggested to me by a gentleman of much various and accurate information *, founded

* The information, which is here referred to, was communicated in some letters, from a very intelligent and scientific Chymist, which are inserted in the Appendix. There will be found also some other papers, originating with the Patentee, which relate to the very singular subject of these proceedings.

 upon

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upon the basis, to which I have already adverted, of the result of casual discovery of these substances, in situations not unconnected with the present subject. Both substances, wood and iron, have been found in contact with, or in deposit within the soil where they have been lodged, either accidentally, or in pursuance of the antient usages of the inhabitants of the country, and discovered afterwards, at very distant periods of time—sometimes separately, and sometimes in conjunction. Three different states of the soil may be supposed, in which these connections with it may have taken place—*one*, where the ground was perfectly dry, and remained so during the whole period of the connection. Both substances, in such a state, may be supposed entitled to a long and sound longevity: Rust does not corrode the one, where moisture and air are excluded—nor rottenness the other, if insects are prevented from committing depredations. The cases of *Egyptian* mummies, composed, it is said, of the sycamore of the country, but ascertained to be of 2000 years standing, are amongst the most signal instances of the *immortale lignum*—a character which *Pliny* appropriates to the larch; though it is not, perhaps, unworthy of notice, that, in the interesting account given of the late disinterment of King *Charles* the First, the wooden coffin is described as very much decayed, though protected, *externally*, from air and moisture, by being enclosed in a leaden coffin, carefully soldered up, and, *internally*, from the gaseous vapours, which these Chymical Gentlemen mention in their affidavits, as proceeding from a dead body, by *cerecloths* and such other integuments.

Another

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Another state is, where they are found in contact with a soil entirely and permanently covered with water, salt or fresh; as where anchors, or bolts, or chains, are fished up from the bottom of the ocean, where they may have lain for unknown ages. The keys of *Lochleven* Castle, fished up from the lake a very few years ago, after having been thrown into it on the flight of the Queen of *Scotland*, had suffered little injury by lying there for more than 250 years. Manufactured wood is said to resist the action of moisture less perfectly; though the instances of *Conway Stakes*, in the *Thames*, and of *Trajan's Piers*, in the *Danube*, are striking proofs of the durability, under some circumstances; and entire trees have been found to have continued unhurt, in point of substance, for centuries, in a submerged state.

But the *third* state is, that which applies more immediately to the present inquiry — that, in which the substances have been subjected to alternations of damp and dryness, and in which they both decay, but at very different periods.

It is a fact, falling within frequent observation, that of the various weapons, that are found buried in the tumuli or barrows, or other places of antient sepulture in this island, the metallic heads of celts and spears, and the blades of swords and daggers, are in a condition, from which they can easily be recovered to their antient use, or to any other metallic use whatever, whilst of the wood, that formed their shafts or handles, or connecting parts, not a particle remains; but are all associated with the soil in which they were buried. Numerous instances,

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instances, authenticated in the most satisfactory manner, occur in the volumes of the *Archæologia*: I owe a collection of them to the active kindness of the same ingenious person.

An affidavit, brought in by the Patentee, and signed by three persons, records an instance of an infant's coffin of iron plate being deposited in the church-yard of *St. Giles, Cripplegate,* and found, covered with rust, at a very short period of time afterwards. I cannot infer much from a single instance of that kind, produced, perhaps, by the singularity of some circumstances, either in the soil, or preparation of the metal, not stated in the affidavit; for if it were a fact not so singularly produced, the instances would be ordinary and frequent. Besides that the covering of rust would, as has been observed, operate, in some degree, to protect the metal from a further hasty decomposition. Perhaps, the common practice, which has been adverted to in argument, of having the ends of park palings and posts shod with iron, for the purpose of preserving them in the ground, may be deemed more than a sufficient counterpoise to such a solitary fact, at least as far as the common apprehensions of men are of any authority upon such a subject.

It is upon these four species of evidence, (if I may so call them) — upon my own impressions, founded upon all personal observation of my own, extremely limited and superficial as it is — upon what appears to be the common apprehension of men generally upon this matter — upon the preponderating opinion of men of science — and upon the results of discoveries, in some degree, though, perhaps, remotely, connected with this subject, that I am

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I am called upon to act — being the best, indeed the only evidence, that I can collect, by any industry of my own, or by the more active industry of others. I must add, that if succeeding experience shall shew, that these premises have led to an erroneous conclusion, it will be for the justice of the parties themselves to correct it; and if they should decline to do so, it will be for the remedial justice of this Court to reduce the matter to its proper standard.

The remaining question is, that of the proper quantum of the increased taxation. Upon that question I am satisfied, by the great variety of circumstances under which both parishes and their cemeteries exist, that there can be no general measure of quantum, which can be deemed universally applicable, even in this Town and its environs. — The size of their church-yards relatively to their population — the possibilities of enlargement, if necessary — the facilities of obtaining additional cemeteries — the means of purchase within the possession of the parish — many circumstances, some of which occur, and others escape present recollection, render what may be said respecting this particular church rate, applicable to others, only with such amplifications, and abatements, as the difference of circumstances may require.

I observe, that there are demands that rather startle at first sight, and require some consideration to reconcile them to notions of propriety. *St. Dunstan's in the West* rates metallic coffins at twenty-five pounds extra fee: I am, however, to remember, that it is a parish extremely populous — in the heart of a most busy part of the metropolis — closely

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closely occupied by buildings — with church-yards extremely circumscribed — and that it is at a great distance from the country environs of this city. Less appears to justify the demand of twenty-one pounds in *Islington* parish — situated as it is out of this town — where ground, though highly valuable, may be more obtainable for the necessary uses of the parishioners. But I cannot take upon myself to say, that there may not be reasons that protect even their charges from the imputation of extravagance.

Upon this particular charge at *St. Andrews, Holborn*, an ingenious calculation was proposed by Dr. *Arnold*, respecting the number of graves of certain dimensions, and of certain depths, the churchyard was capable of receiving. — If I took it accurately, it assumed as a basis, what I think is not to be admitted, that they were to descend to a depth below the soil of fifteen feet. As far as I could follow the calculation, I did not discover other fallacies — but fallacy, I think, there must be, for it seems quite incredible, that parishes, if they could act, *conveniently*, upon such a calculation, would incur the inconvenient expence, as they very frequently do, of purchasing new cemeteries.

An objection was taken to the application of the fee, as stated in the table. — I think that this is a matter into which the present party has no right to look. — If the whole demand be a proper demand for the longer occupancy of the ground, he has no right to quarrel with the public uses to which the parish immediately applies it, taking upon themselves the burthen of providing additional grounds for interment, when required. The objection to the

the Incumbent's proportion, seems entirely to forget, that by the general law, it is the Incumbent who has the freehold of the soil of the churchyard, though provided originally by the parish. By acquiescence, confirmed by usage, parishes in this Town, and neighbourhood, have acquired concurrent rights, into the validity of which it is quite unnecessary, and improper, for me to enquire, as no adverse claim is or can be raised, in the course of the present discussion, in which the Incumbent and parishioners stand upon one agreed footing of interest.

The sum charged is not for an iron coffin, but generally for a *metallic* coffin, and, I think, without impropriety. Because having a right to know the extent of the Patentee's powers, they find, that under this patent, he has just the same right to offer coffins of brass, or tin, or any metals, or mixtures of metals, which human ingenuity can devise, as coffins of iron. Those which are called the precious metals, may very well, from their intrinsic value, be deemed, in their own nature, extreme and excluded cases—but this Court cannot, by conjecture, limit the possibilities of human art, and take upon itself to determine, that by no attainable extension of discovery or improvement, other metals, and mixture of metals, may not be brought within the compass of a very reduced expence. Within our own time, other metallic bodies have been discovered, and other compositions of metal invented. And it is the more reasonable, in this case, to include such a supposition; because it is clear, from the universality of the terms, in which the Patentee has sued out his own patent,

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patent, that he has included them himself, in his own speculations of profit.

It is well worthy of observation, that these coffins are, by their construction, out of the reach of all examination. The parish has no check, no means of internal search for prohibited materials. They may be internally varnished, or painted, or tinned, or otherwise prepared, so as to increase their duration, without betraying themselves, by any considerable increase of weight, or by any other manifestation. The parish is to accept them, upon the mere *bona fides* of the maker, guaranteed only by the general presumption, that more durable coffins would not answer his purpose, for a general traffic: Even that would not exclude particular bargains with many individuals, who felt particular anxiety about their relations. It would not exclude more durable metals for his general traffic; if, by the improvements of art, he could be supplied with them at a marketable price. It appears rather too much to expect, that the matter should be settled upon an assumption, that these coffins, liable to no inspection, should be always of the exact quality which these affidavits describe. The parish has a right to guard itself against this way of increased expence—against the substitution of other metals, and the use of other disguises, even supposing, that the simple coffin of rolled iron was fairly entitled to be received on the same footing as the coffin of oak.

The state of this parish is, likewise, to be gravely considered—situated in a most crowded part of this town—with a dense population both of the living and the dead; both populations rapidly increasing.

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increasing. Here are four cemeteries crammed full of bodies, packed as close as notions of decency and convenience will permit. Here is a crying demand for more sepulchral space, with great difficulty of obtaining it. Is such a parish a fit subject for an experiment? for such it must be deemed, even by those who interpret the evidence, most favourably, for the iron side of this question, and without adding, as most persons, I think, would do, a preponderance on the other side.

The inconvenience on one side is, that the Patentee of a novel invention must postpone his ample harvest of profit, till it is ascertained by experiments, made in places where no mischief can arise, whether it can be admitted in others, where it may disturb the fair use of a public, an antient, and a sacred possession.—No Court could, I think, hesitate upon the decision of such an alternative, if proposed. The attempt to force this novelty, has certainly, produced public uneasinesses, which ought to be treated with indulgence, and has, generated oppositions, which have a right to be fairly disarmed, if to be disarmed at all. Let experience shew, (and not many years experience will be required to shew what really exists), that the apprehensions entertained, are entertained without foundation. If that *can* be shewn, it is to be hoped, that the parishes themselves will do their duty, and if they do not, the Courts must endeavour to do theirs. At present, the subject requires further probation, before such a claim can be enforced: It is breaking ground for a novel purpose, in a soil not yet sufficiently explored to be known, how far it is at all fit; and the Court must see, and know much

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much more, and more authentically, before It can decree present notions, and existing practice, founded upon such notions, to be overthrown.

The sum charged, or proposed to be charged, is ten pounds extra; and I observe, what adds to the authority of the measure, that *St. George's, Hanover Square*, a parish peculiarly well governed, has proposed to adopt the same. It is possible, that if it had belonged to me, to fix the measure in the first instance, I might have rated it somewhat lower. I observe, that *St. Saviour's, Southwark*, which states similar circumstances of necessity, arising from their population, and the extent of their burial grounds, fixes it at five pounds; and *St. George's, Middlesex*, £6 9*s.* 6*d.*, stating, likewise, the same necessities. However, I shall not disturb what the parish has done, upon a deliberate consideration of all local circumstances, some of which may have escaped me, until the result of more experience is seen.

I hesitate more upon the expressed condition, that the graves for the coffins shall be fifteen feet deep; I doubt not a little, both upon the justice and the prudence of this. If the parish accepts what it considers as a fair compensation for the longer occupancy of the ground, it should rather seem, that the coffin is entitled to be received into this same ground. — The condition will occasion additional expence — may produce occasional difficulties, from obstructions — may lead to the irruption of water, and so affect other interments; and what weighs not lightly, it will put this question of durability too much into the hands of the other party, for these coffins buried at such a depth, will

remain

remain out of sight, and out of attention—the parish will have no means of observing the period of decay. But the persons who have an interest in the future reception of these coffins, will be provided with means of observation upon the comparative durability; and if the question should be revived, it will come on their side, with all the advantage of the evidence of experience to be produced by them alone.— I wish this matter to be reconsidered; when I understand, that it has undergone a reconsideration — I shall be prepared to sign the table.

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On 18th *May*, the table of fees as proposed was signed, *that condition* being omitted.

BURN v. FARRAR,
FALSELY CALLED FARRAR.

30th *June* 1819.

Nullity of marriage alleged on the *lex loci* of *France*, on a marriage between *English* subjects, celebrated by the chaplain of the *British* forces, then in the occupation of the country. Libel admitted: Principal question reserved.

THIS was a case of nullity of marriage, instituted on the part of the wife, with reference to the circumstances of the marriage, as celebrated in *France*, by the Chaplain of the *British* forces, under the Duke of *Wellington*, and not in conformity to the law of *France*, as pleaded and set forth. Upon admission of the libel *in pœnam*, no appearance having been given for the husband, Dr. *Swabey* described the nature of the case, as above stated, observing, that it would be, when proved, a legal ground of nullity; as marriage, like all other contracts, should be celebrated according to the *lex loci*.

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Sir *William Scott.* — I shall admit this libel to proof, without deciding at present on the effect which it may have if proved; but merely to assist the party proceeding, in procuring, if possible, an answer to it from the opposite party. I have received several letters addressed to me by *English* Clergymen, and others, in foreign countries, relative to marriages of this kind, which letters I have felt it to be my duty not to answer; as it certainly is no part of my public duty, to answer private inquiries upon questions, which may come judicially before me. Some of the marriages, which gave occasion to those letters, have been contracted under circumstances similar to the present; and it will be too much to expect, that I should instantly give a judgment upon such questions, in an undefended suit, and in which I can hear no argument in support of the validity of the marriage.

It appears, that the husband here was an officer of the army of occupation; and it may, therefore, very well be doubted, whether he was at all subject to the *French* law, as pleaded in the libel. I shall give no decided opinion on that point at present; but I shall admit the libel, in order that the party may be the better enabled to obtain an appearance, and bring the cause to a regular decision upon proper argument.

No further proceedings have taken place.

RUDING *v.* SMITH,

FALSELY CALLING HERSELF RUDING.

11 July, 28 July, 1 August 1821.

Nullity of marriage, alleged on the *lex loci* of *Holland*, as not conformable thereto, with reference to a marriage celebrated between *British* subjects at the *Cape*, by the chaplain of the *British* forces, then occupying that settlement under capitulation. Libel not admitted.

THIS was a case of nullity of marriage, brought by the husband, to set aside a marriage celebrated in a room in a private house, between the parties, being *British* subjects, at the *Cape of Good Hope*, on the 22d *October* 1796, by the Chaplain of the *English* forces, by virtue of a licence or permission from General Sir *James Craig*, the commander of the *British* forces at the said colony.

The libel pleaded the surrender of the *Cape* to the *British* forces in 1795, and the terms of capitulation, "that the inhabitants of the *Cape* "should preserve their prerogatives, and the ex- "ercise of public worship, which they at present "enjoy:" and that the laws of the United Provinces, which were in force at that time, had never been repealed or altered. It then set forth the law of *Holland* * respecting marriage, and

* The fourth article of the libel pleaded, "that in and by the "laws of the United States prevailing in the said settlement or "colony, every marriage between persons who were respectively "of the religion established by law within the said settlement or "colony, must be celebrated in the parochial church of the parish "in which one of the said persons resided, by the priest or minis- "ter thereof, otherwise the same would be void and of no effect: "That in and by the said laws, every marriage between persons "both or either of whom were dissenters from the religion "established by law within the said settlement or colony, must "be so solemnized or contracted before a magistrate at his "ordinary place of session, otherwise the same would be void "and of no effect; and the party proponent doth further "allege and propound, that in and by the said laws no legal "and valid marriage could be had or solemnized within the "said

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and alleged, That between persons both, or either of them, dissenting from the religion established by law, marriage must be solemnized or contracted before a magistrate, or otherwise the same would be null and of no effect; and that no exception was allowed for persons being strangers or foreigners. It then pleaded the principal circumstances in the situation of these parties, "that the wife was "born at *Fort Saint George*, in *India*, in *November* "1777, and *Mr. Ruding* in 1774, in *England*: that "they were resident at the *Cape* in *September* and "*October* 1796;" and prayed, that the marriage

"said settlement or colony, either between persons who were "respectively of the religion by law established, or both or "either of whom were dissenters from the same, without due "publication of banns three several times, or without a licence "or dispensation from the same, granted by the supreme au-"thority of the States, in whom the power of granting such "licence or dispensation was exclusively vested, and that such "licence or dispensation was never granted by the said supreme "authority, for more than one or two of the said necessary "publications of banns: That in and by the said laws, no *man* "under the age of *thirty* years could lawfully contract marriage "without the consent of his parent or parents, if living, first had "and obtained, or if dead, of his guardian or guardians lawfully "appointed; and that no *woman* under the age of *twenty-five* "years, could lawfully contract marriage without the consent "of her parent or parents if living, or if dead, of her guardian "or guardians lawfully appointed; and that all marriages, where "the man was under the age of thirty years, or the woman "under the age of twenty-five years, had and solemnized with-"out the consent of the parents or parent, if living, or if dead, "of the guardian or guardians lawfully appointed of the party "so under the age of thirty or twenty-five years, were abso-"lutely null and void to all intents and purposes in law what-"soever; and that no difference or exemption whatever was "made or allowed for or on account of any person or persons "whatever, being foreigners, or *in itinere*, or otherwise; but "the same were binding upon all persons whatever, desirous "of contracting matrimony within the said colony."

being

being had in a private house, not in the parochial church, without banns or licence, and without consent of parents as required by the law of *Holland*, might be pronounced to be null and invalid.

The admission of the libel was opposed by Dr. *Jenner* and Dr. *Phillimore*—who submitted, that though the principle of *lex loci*, which was assumed in the libel, might be very just, as an affirmative position; it would not follow, that the converse of that proposition was true, that no marriage contracted in a foreign country could be good, unless it was solemnized according to the law of the place: That the general principle could not apply to persons being at the *Cape*, as *British* subjects, under the protection of the *British* forces, then in possession of the settlement, by virtue of the recent surrender; that such persons must be supposed to contract with reference to the law of their own country, according to the distinction maintained even by *Huber* *, and admitted by Lord *Mansfield* in the case of *Robinson* v. *Bland*,† that marriage is to be considered not so much with respect to the *locus contractûs*, as of the place where it is to be exercised. That the terms of the capitulation might preserve to the inhabitants the enjoyment of their former laws, but it would be unreasonable to impose them as paramount authority on all *English* subjects, who might be with the *British* army in the condition of conquerors; that in *Gibraltar*, in the *East Indies*, and in other places, the exercise of particular religions is reserved to inhabitants; yet the marriages of *English*

* Prælectiones Juris Civilis.—De Conflictu Legum, l. 1. tit. 3. § 10.

† 2 *Burrows*. 1077.

 subjects

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subjects in those places, under the *English* laws, had never been disputed.

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In support of the Libel,—Dr. *Lushington* and Dr. *Dodson* contended,—That it had been established by the highest authority, that, in conquered countries, the laws remained in force, till altered by competent authority.* That the authority of the laws, so continued, was binding on all persons; and there was no distinction, as to contracts between natives, and strangers, except as to property situated in another country. † That it had been laid down in this Court, in the recent case of *Dalrymple* v. *Dalrymple* ‡, that all persons contracting marriage are bound to celebrate such marriage according to the *lex loci*: It had been so held in older cases, in *Compton* v. *Bearcroft* §, and in *Ilderton* v. *Ilderton* ‖; and the distinction now contended for, as to persons in the character of conquerors, could not be maintained. In *Burn* v. *Farrar* **, which was a case of *British* subjects married in *France* by licence, and permission of the Duke of *Wellington*, the Court admitted the libel; but intimated, that it was a question of moment, in which It was not disposed to proceed further in the absence of the husband, who was said to be gone to *South America*. If that marriage could be held good, it must be owing to the particular situation of the *British* armies in *France*: *There* was no conquest, and no

* *Calvin*'s case, 7. Coke's Rep. 17, 18.

† *Campbell* v. *Hall*, 1. Cowper, 208. On that subject, see also 2. P. Wms. 75. and the exception therein stated, "unless "it be contrary to the Law of *England*, or *malum in se*, or "an *omitted* case." And the very able argument of Mr. *Nolan* upon it in the case of Governor *Picton*, St. Tr. vol. 30. p. 833 et seq.

‡ Vid. supra, p. 54.

§ Deleg. 1769.

‖ 2. H. Bl. Rep. 145.

** Vid. ante, p. 369.

natural

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natural communication with the civil authorities, nor opportunity of resorting to the tribunals of the country. In this instance, such a plea could not be advanced, as the laws had been recognized; and there was a special provision in those laws for the case of strangers, and dissenters from the religion of the place, by which the celebration of this marriage might have been had as easily, as by the mode which had been adopted. The principle of resorting to *English* law would carry with it a great inconvenience, as the law so imported, would be, not the present law of *England*, but such as had been in force seventy years ago. The case of *British* subjects in *India* was peculiar and *sui generis;* as they were exempted from the law of the country, and lived as persons in factories, under the faith of treaties, and the provisions of sundry charters and acts of parliament. In the case of *Middleton* v. *Janverin* *, a marriage solemnized in *Flanders*, but not according to the *lex loci*, had been set aside; and it was submitted on those authorities, that this marriage, being had without publication of banns, and without a licence from any competent authority, or according to the laws of *Holland*, was null and void.

In reply—Dr. *Jenner* and Dr. *Phillimore*—The proposition advanced on the other side, would amount to this, that officers serving in the *British* forces, at the surrender of the *Cape*, would be instantly subject to the laws of the conquered country, in all cases, and in all transactions, even between themselves, — which would be a manifest absurdity. That the general principle of the *lex loci* could not

* Vid. post, p. 437.

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be applied universally as a negative proposition. It necessarily contained in it many qualifications and exceptions, as with respect to Polygamy, and other customs, which could not be reconciled to the laws and the religion of this Country. The present case also, necessarily formed another exception. The authority of the decision in *Campbell* v. *Hall* referred to persons settling in a foreign colony, and was not applicable to the question before the Court. Military persons, and others accompanying the military occupation, are to be considered in a different point of view; *with respect to such persons Voet*,* and *Huber*, admit the distinction, that they must be understood to contract according to the laws of their own country; as an exception founded on the nature of their situation. In *Compton* v. *Bearcroft*, the question did not turn on the validity of the marriage by the law of *Scotland*, because nothing appeared respecting that law; the libel pleaded only the marriage act, and the nullity of the marriage as alleged, contracted by persons going to *Scotland* to celebrate a marriage there, in evasion of the law of their own country. The Court held, that the marriage act, in its terms, did not apply to *Scotland*, and could not be extended on the principle of evasion. On that ground It did not sustain the libel; but gave no opinion on the effect of the law of *Scotland* on that marriage, as that question had not been raised in the pleadings.† In *Dalrymple* v. *Dalrymple*, the parties

* In Dig. lib. 23. tit. 2.

† It appears from the argument in *Compton* v. *Bearcroft*, that, soon after the Marriage Act, many instances had occurred of persons going into *Scotland*, to evade the restrictions of that Act. The cases of *Bedford* v. *Varney*, 1762, before Lord *Northington*, and

parties were inhabitants of the country, and one a native inhabitant. If Mr. *Ruding* had married a *Dutch* lady, it might, perhaps, have imposed on him an obligation to conform, in such marriage, to the laws of the settlement; and a departure from them might have been fatal. In *Middleton* v. *Janverin*, the marriage was designed to be according to the law of *Austrian Flanders*, without any intention to adhere to the *British* law.

COURT.—Could it be laid down conversely, that all marriages abroad according to the *British* law, would be good?

Dr. *Jenner*.—I will not undertake to offer an opinion on that point; as I do not feel myself called upon to maintain that proposition; at present, it may be sufficient to say, that there are no cases which establish the contrary: The present case rests on special grounds; — the impossibility of subjecting all individuals, accompanying a conquering army, to the laws of the conquered country. Among other requisites of the *Dutch* law, is the consent of parents, which must, in almost all such marriages, be impossible to be obtained, as it was peculiarly in the present instance, from the circumstances of the case.

and *Brook* v. *Oliver* at the Rolls, before Sir *Thomas Clarke*, 1759, were mentioned, being cases of bequests, dependent on the validity of such marriage, in which it had been contended, *that the marriage was not valid;* but the objection was over-ruled, and the points in those cases adjudged accordingly. — It was said also, that Lord *Northington* must have been well acquainted with the spirit and intention of that act, as he had been much concerned in procuring it.

The notion of impeaching those marriages, on the ground of evasion stated in the libel, is there supposed to have proceeded from the observations of Lord *Mansfield*, in *Robinson* v. *Bland*, as to the exception that might be admitted in such cases on that principle, as suggested by *Huber*.

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JUDGMENT.

Lord *Stowell*.*—This is a suit brought by *Walter Ruding*, Esq. against *Jemima Claudia Smith*, for the purpose of praying this Court to pronounce null and void his marriage had with that lady under the following circumstances:—She was born at *Fort St. George*, in the *East Indies*, in the month of *Nov.* 1777. His birth took place at *Kineton*, in the county of *Warwick*, on the 13th day of *May* 1774. In *September* 1796, she was at the *Cape of Good Hope*; the *Cape* had surrendered a year before: For what purpose she came thither, or how long she meant to remain, does not appear. At the same time Mr. *Ruding* came thither also, in his way to the *East Indies*, being at that time a captain in the 12th Regiment of Foot. On the 22d of *October* 1796, they were married by the chaplain of the *British* garrison, under the authority of a licence granted by General *Craig*, the commander in chief of the *British* forces in that Country. When the marriage was performed, Mr. *Ruding* was of full age; but the lady was under the age of nineteen. The consent of parents or guardians, required by the *Dutch* law then generally prevailing at the *Cape*, was not obtained, as regarded either of the contracting parties. Her father had died some years before, and her mother had married a second husband; and no appointment of guardians had taken place. It is contended by the husband, that by the *Dutch* law at that time in force at the *Cape*,

* On 14th of *July*, Sir *Wm. Scott* was created a Peer of the United Kingdom of *Great Britain* and *Ireland*, by the title of Baron *Stowell*, and on 14th of *August* resigned the chair of the Consistory Court. He was succeeded by Sir *Christopher Robinson*, LL.D. His Majesty's Advocate General.

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this marriage was null and void: and on that ground he seeks the aid of this Court, to pronounce a sentence declaratory of its nullity.

The case of facts which I have stated, and the *Dutch* law under which, if applied to these facts, the marriage is to be invalidated, are pleaded in the libel; and I think that there is little doubt, that the *Dutch* law, with respect to persons to whom It really applies, is fairly represented, and would be so proved, if the libel was admitted. As little doubt is there, that the facts of the case would be established by clear proof; but the real question is, whether the *Dutch* law, so pleaded, ought to govern entirely and exclusively, this case of fact applying to these individuals? For if it ought not, the libel, which rests the case upon it, ought not to be admitted.

In order to maintain that the *Dutch* law ought to govern the case, the party pleads, first an article in the capitulation, under which the *Dutch* colony was surrendered to the *British* arms. That stipulation covenants, that the inhabitants shall *preserve the prerogatives which they enjoy at present.* The meaning of this article, be it what it may, for the term used "*prerogatives*" is sufficiently indefinite and obscure, can never be extended to the *British* Conquerors, *ex vi terminorum.* They are the Grantors, not the Grantees. They were not in the enjoyment of any prerogatives whatever under the *Dutch* law; they had nothing under it which they could wish to preserve. It is impossible that the *Dutch* could intend to stipulate for them. It has, therefore, I think, been nearly admitted, that as to the *British* Conquerors, this article has no intelligible application; consequently, if the *Dutch* law binds them, it must be by some other obligation, by which, independent of this article of capitulation, the

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the *Dutch* law imposes itself upon them. In order to bring it a little nearer, after pleading in the following articles what the *Dutch* law of marriage is, it is stated also, "that that law binds *all persons whatever* "*within the colony*, foreigners as well as natives, for "that their laws say so, and that their learned lawyers "will support that doctrine, and that their Courts "will enforce it." Now, if that be true, that the law binds the *British* conqueror immediately upon the capitulation, (there being no express covenant to that effect) it must be either from some known rule of the Law of Nations, which subjects the conquerors to the laws of the conquered, or from some peculiar principle of the law of *England*, which imposes such an obligation upon the *British* conquerors of the possessions of the enemy; for clearly the *Dutch* law, taken by itself, cannot directly, and by its own force, bind them. *Dutch* authority could not impose it, for *Dutch* authority had ceased; and a *Dutch* Court, taking upon Itself to force this law upon *British* parties only, and in transactions purely *British*, might be thought to put forward no very just or moderate pretension; unless some authority, superior to It, had imparted to It a force, which It did not itself directly possess. Such an authority, if it exists at all, must be found either in the Law of Nations, or in the *British* law, for no other authority could give it. I am not aware that any such principle or practice exists in the general law of Nations. It sometimes happens, that the conquered are left in possession of their own laws — more frequently the laws of the conquerors are imposed upon them; and sometimes the conquerors, if they settle in the country, are content to adopt for their own use such part of the laws, prevailing before the conquest, as they

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may find convenient, under the change of authority, to retain. I presume, that there is no legal difference between a conquered country and a conquered colony in this respect, as far as general law is concerned; and I am yet to seek for any principle, derivable from that law, which bows the conquerors of a country to the legal institutions of the conquered. Such a principle may be attended with most severe inconvenience in its operation. The laws may be harsh and oppressive in the extreme; may contain institutions abhorrent to all the feelings, and opinions, and habits of the conquerors: at any rate they can be but imperfectly understood; and that they should all of them instantaneously attach, and continue obligatory upon them, 'till their own Government had time to learn them, and select and correct them, is a proposition which, I think, a professor of general law would be inclined to consider cautiously, before it could be unreservedly admitted.

But it is argued to be the doctrine of the law of *England;* if so, it is not the less hard, as the municipal code of our country is generally admitted to be more liberal, and more indulgent, than the codes of most other countries. It would be a most bitter fruit of the victories of its subjects, if they were bound to adopt the jealous and oppressive systems of all the countries, which they subdued, and to groan under all the tyranny *, civil and ecclesiastical, of those systems, till their own government, occupied by the pressure of existing hostilities, had time to look about, to collect in-

* See on this point the argument in the case of Governor *Picton*, St. Tr. vol. 30. p. 833 et seq., and note supra, p. 374.

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formation, and to prescribe rules of conduct more congenial to their original habits. To learn what the laws of a country are, is not the work of a day, even in pacific times, and to persons accustomed to legal inquiries; and to construct a code, fit for such a new and mixed situation of persons and things, demands, not without reason, a very serious *tempus deliberandi;* and conquerors are, certainly, not the last men, who are entitled to the protection of their country under new grievances.

I am perfectly aware, that it is laid down generally, in the authorities referred to *, "that the laws of a "conquered country *remain*, till altered by the new "authority." I have to observe, first, that the word *remain* has, *ex vi termini*, a reference to its obligation upon those, in whose usage it already existed, and not to those who are entire strangers to it, in the whole of their preceding intercourse with each other. Even with respect to the ancient inhabitants, no small portion of the ancient law is unavoidably superseded, by the revolution of government that has taken place. The allegiance of the subjects, and all the law that relates to it—the administration of the law in the Sovereign, and appellate jurisdictions—and all the laws connected with the exercise of the sovereign authority—must undergo alterations adapted to the change. This very libel furnishes instances of this sort. In the third article it is stated, "that dispensa-"tions from the publication of banns must be had "from the authority of the States of *Holland*." That,

* *Calvin's* case, 7. Coke's Reports; and *Hall* and *Campbell*, *Cowper*, p. 208.

I must presume, could not be continued during the existence of the war, and the extinction or suspension of the sovereignty of that nation. But, secondly, though the old laws are to remain, it is surely a sufficient application of such terms "*that* "*they shall remain in force*," if they continue to govern (so far as they do continue) the transactions of the ancient settlers with each other, and with the new comers. To allow that they shall intrude into all the separate transactions of these *British* conquerors, is to give them a validity, which they would otherwise want, in all cases whatever.

It is certainly true, that in *Hall* and *Campbell*, that most eminent Judge, Lord *Mansfield*, a person never to be named but with accompanying expressions of reverence, has laid down the following proposition: "That the law and legislative go-"vernment of every dominion, equally *affects all* "*persons*, and all property, within the limits "thereof; and is the rule of decision for all ques-"tions which arise there. Whoever purchases, "lives, or sues there, puts himself under the law "of the place. An *Englishman* in *Ireland*, *Mi-*"*norca*, the *Isle of Man*, or the plantations, has "no privileges distinct from the natives." *Huber*, too, speaking upon general principles, had before promulgated the same doctrine:—"*Pro subjectis* "*imperio habendi sunt omnes, qui intra terminos* "*ejusdem reperiuntur, sive in perpetuum, sive ad* "*tempus ibi commorantur*."* But to such a proposition, expressed in very general terms, only general truth can be ascribed; for it is, undoubtedly, subject to exceptions.

* De Conflict. Leg. l. 1. t. 3. § 2.

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It is not to be said, that Embassadors and public ministers are subject to the whole body of the municipal law of the country, where they reside. They belong, in great part, to the country which they represent. Even the native and resident inhabitants, are not all brought strictly within the pale of the general law. It is observed by the learned Dr. *Hyde*, that there is in every country, a body of inhabitants, formerly much more numerous than at present, (and now generally allowed to be of foreign extraction) having a language and usages of their own, leading an erratic life, and distinguished by the different names of *Egyptians*, *Bohemians*, *Zingarians*, and other names, in the countries where they live: Upon such persons the general law of the country operates very slightly, except to restrain them from injurious crimes; and the matrimonial law hardly, I presume, in fact, any where at all. In our own country and in many others, there is another body, much more numerous and respectable, distinguished by a still greater singularity of usages, who, though native subjects, under the protection of the general law, are, in many respects, governed by institutions of their own, and, particularly, in their marriages; for it being the practice of mankind to consecrate their marriages by religious ceremonies, the differences of religion, in all countries that admit residents professing religions essentially different, unavoidably introduce exceptions, in that matter, to the universality of That rule, which makes mere domicile the constituent of an unlimited subjection to the ordinary law of the country. The true statement of the case results to this, that the exceptions, when admitted, furnish

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furnish the real law for the excepted cases; the general law steers wide of them. The matrimonial law of *England* for the Jews, is their own matrimonial law; and an *English* Court Christian, examining the validity of an *English* Jew marriage, would examine it by that law, and by that law only, as has been done in the cases, that were determined in this Court on those very principles.* If a rule of that law be, that the fact of a witness to the marriage having eaten prohibited viands, or profaning the Sabbath-day, would vitiate that marriage itself, an *English* court would give it that effect, when duly proved, though a total stranger to any such effect upon an *English* marriage generally. I presume, that a *Dutch* tribunal would treat the marriage of a *Dutch* Jew in a similar way, not by referring to the general law of the *Dutch* Protestant Consistory, but to the Ritual of the *Dutch* Jews established in *Holland*.

What is the law of marriages, in all foreign establishments settled in countries, professing a religion essentially different? In the *English* Factories at *Lisbon*, *Leghorn*, *Oporto*, *Cadiz*—and in the Factories in the East; *Smyrna*, *Aleppo*, and others? in all of which, (some of these establishments existing by authority under treaties, and others under indulgence and toleration) marriages are regulated by the law of the original country, to which they are still considered to belong. An *English* resident at *St. Petersburgh* does not look to the Ritual of the Greek Church, but to the Rubric of the Church of *England*, when he contracts a

* Vid. supra, vol. i. pp. 216. 324.

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marriage with an *English* woman.* Nobody can suppose, that whilst the *Mogul* empire existed, an *Englishman* was bound to consult the Koran, for the celebration of his marriage. Even where no foreign connection can be ascribed, a respect is shewn to the opinions and practice of a distinct people. The validity of a Greek marriage, in the extensive dominions of *Turkey*, is left to depend, I presume, upon their own canons, without any reference to *Mahometan* ceremonies. There is a *jus gentium* upon this matter,—a comity, which treats with tenderness, or at least with toleration, the opinions and usages of a distinct people in this transaction of marriage. It may be difficult to say, *a priori*, how far the general law should circumscribe its own authority in this matter; but practice has established the principle in several instances; and where the practice is admitted, it is entitled to acceptance and respect. It has sanctioned the marriages of foreign subjects, in the houses of the Embassadors of the foreign country, to which They belong: I am not aware of any judicial recognition upon the point; but the reputation, which the validity of such marriages has acquired, makes such a recognition by no means improbable, if such a question was brought to judgment.† In the case which has now occurred,—the

* A Register of English marriages, celebrated at *St. Petersburgh*, is transmitted to the Registry of the Consistory Court of *London*.

† *Vide supra*, *Vol.* i. *p.* 136. There has been no other decided case of that description, of which any trace can be discovered. In the argument on *Harford* v. *Morris*, the case of *Lacy* v. *Dickinson*,

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the case of a conquering force, stationed in a conquered country or colony, for the purpose of enforcing the reluctant obedience of the natives, and composing, for the present, a distinct and immisceable body,—can it be maintained, that the success of their arms, and the service of vigilant control in which they are employed, lays them at the feet of the civil jurisdiction of the country, without any exception whatever? In a former case *, the Court *intimated* Its opinion,

inson, Consist. 1769, was mentioned, in which the parties, being both *English* subjects, who had resided at *Amsterdam*, went to *Paris*, and were married by leave of the *Dutch* Embassador, in his hotel, and by his Chaplain, *in the absence of the English Embassador*. They came afterwards to *England*, and the wife brought a suit of jactitation, in which Mr. *Dickinson* justified under the marriage, as alleged. In reply, the wife pleaded the laws of *Holland*, " that marriages solemnized between the subjects " of their High Mightinesses, or others, in a house of an Embas- " sador of the States General in Foreign Countries, between the " subjects of the States General, or others, unless the parties " had been first contracted by the law of *Holland*, and such " contract duly registered, and unless banns be duly published, " in *Holland*, before the performance of the same, is null and " void, to all intents and purposes." It pleaded also, " that, " by the laws of *France*, a marriage solemnized, not *in facie ec- " clesiæ*, and on publication of banns, and by the priest of the " church of the parish where the parties live, and where they " are domiciled, unless by special licence and faculty, is null and " void."—That cause went no further, owing to the death of the husband. The case was cited in that argument to shew, that the *lex loci* had been distinctly pleaded as the ground of nullity, and the allegation admitted to that effect. It is noticed here, as shewing *on what principles a marriage, celebrated in an Embassador's chapel*, was pleaded, and what was opposed to it on the other side.

* Vid. supra, *Burn* v. *Farrar*, p. 370.

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(for the case never reached a decision) that the law of *France* would not apply to an officer of the *English* Army of Occupation, marrying an *English* lady; on the ground that, at that time, and under such circumstances, the parties were not *French* subjects, under the dominion of *French* law; and surely the condition of a garrison of a subdued country, is not more capable of impressing the domestic character, and all the obligations it carries with it, than the situation of the Army of Occupation at that time in *France*.

Much of the order of a society, so peculiarly placed, depends upon a discreet application of general principles to particular institutions; this can hardly be specified before hand. But that the whole mass of law, formed for another state of things, and for a *status personarum* widely different, is to be immediately forced down upon these foreign guardians, in their own separate transactions, and without any reserve or limitation, is a proposition much too inconvenient in its consequences, to be perfectly just in its principle.

The time of this transaction is to be considered. The marriage took place at no great distance of time from the compelled surrender. This case therefore has no resemblance to the case of *Ireland*, the *Isle of Man*, the plantations, or even *Minorca*, where recognised civil governments had been established, and a permanent system introduced, of which all must be supposed cognizant. The *Cape* was conquered, but not ceded; and it remained for a treaty of peace to decide, to whom it was to belong. The ancient civil sovereignty was suspended, and no other fully established

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in its place. The character of the individuals is likewise to be considered. The husband goes there, not as a volunteer, or a settler, by intention of his own, or there to remain; but in the character of a *British* soldier, in the prosecution of a further voyage directed by *British* authority. He does not put himself under the law of the place; he goes there neither to purchase, sue, nor live. What the legal case of persons engaging in such concerns would be, I am not called upon to inquire; much less am I disposed to determine. The party principal is a military servant of the *British* government, sent upon a public errand elsewhere, and though *in itinere*, is not so upon any movement of his own. Whatever a *Dutch* Court might determine upon the general case of a foreigner, or even of a passing traveller, however just in such cases, has no pertinent application to the present.

Suppose the *Dutch* law had thought fit to fix the age of majority at a still more advanced period than thirty, at which it then stood—at forty—it might surely be a question in an *English* Court, whether a *Dutch* marriage of two *British* subjects, not absolutely domiciled in *Holland*, should be invalidated in *England* upon that account; or, in other words, whether a protection, intended for the rights of *Dutch* parents, given to them by the *Dutch* law, should operate to the annulling a marriage of *British* subjects, upon the ground of protecting rights, which do not belong, in any such extent, to parents living in *England*; and of which the law of *England* could take no notice, but for the severe purpose of this disqualification? The *Dutch*

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Jurists, *as represented in this libel*, would have no doubt whatever, that this law would clearly govern a *British* Court: But a *British* Court might think *that* a question, not unworthy of further consideration, before It adopted such a rule, for the subjects of this country. In the article of the libel which follows, it is alleged, that such a marriage would be declared by *Dutch* tribunals and *Dutch* Jurists, not only null and void in *Holland*, and the colonies, *but likewise in this kingdom*, and in *every other* country. I should presume, that this is a claim of universal jurisdiction, which *Dutch* Jurists, and *Dutch* tribunals, would not make for themselves. In deciding for *Great Britain* upon the marriages of *British* subjects, they are certainly the best and only authority upon the question, whether the marriage is conformable to the general *Dutch* law of *Holland;* and they can decide that question, definitively, for themselves and for other countries. But questions of wider extent may lie beyond this: whether the marriage be not good in *England*, although not conformable to the general *Dutch* law, and whether there are not principles leading to such a conclusion? Of this question, and of those principles, they are not the authorised judges; for this question, and those principles, belong either to the law of *England*, of which they are not authorised expositors at all, or to the *jus gentium*, upon which the Courts of this country may be supposed as competent as themselves, and, certainly, in the cases of *British* subjects much more appropriate judges.

It is true, indeed, that *English* decisions have established this rule, that a foreign marriage, valid ac-

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cording to the law of the place where celebrated, is good every where else; but they have not *è converso* established, that marriages of *British* subjects, not good according to the general law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in *England*. It is therefore, certainly, to be advised, that the safest course is always to be married according to the law of the country, for then no question can be stirred; but if this cannot be done on account of legal or religious difficulties, the law of this Country does not say, that its subjects shall not marry abroad. And even in cases where no difficulties of that insuperable magnitude exist, yet, if a contrary practice has been sanctioned by long acquiescence and acceptance of the one Country, that has silently permitted such marriages, and of the other, that has silently accepted them, the Courts of this country, I presume, would not incline to shake their validity, upon these large and general theories, encountered, as they are, by numerous exceptions in the practice of nations.

The libel here states a case of marriage as nearly entitled to the privileges of strict necessity as can be. The husband was a person entitled, by the laws of his own country, to marry without consent of parents, or guardians, being of the age of twenty-one; but by the *Dutch* law, he could not marry without such consent till he is thirty years of age. Now, I do not mean to say, that *Huber** is correct in laying down as universally true, " that *personales quali-* " *tates, alicui in certo loco jure impressas, ubique cir-*

* De Conflict. Leg. l. i. tit. 3. s. 12.

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"*cumferri, et personam comitari*"—that being of age in his own country, a man is of age in every other country, be their law of majority what it may; yet it is not to be laid out of the case, that the *Dutch* law would impose, in this respect, a very unfavourable disability upon the *British* subject; and it was one which, in the situation of this individual, it was extremely difficult, indeed, almost impossible for him to remove, even supposing that the *Dutch* law contemplated the protection of parental rights of *British* subjects living in *England*. His father lived in *England*, and he was pursuing his prescribed course to the *East Indies* for the military service. The lady was a little younger, but her father had died in the *East Indies*, and her mother was married again, and no guardian had been appointed. It would puzzle the person most versed in that most difficult chapter of general law, the *conflictus legum*, to say how a marriage could be effected, under such circumstances, in a manner satisfactory to the *Dutch* requisitions. Under such difficulties as regarded the *Dutch* law, the marriage naturally enough was not solemnized with any reference to that law, but under a formal licence from the *British* Governor, and by the ministration of an *English* Clergyman, the Chaplain of the *English* Garrison. The Crown, it is admitted, has the power of altering all the laws of a conquered country. This is an act passing under the authority of the Representative of the *British* Crown, and between *British* subjects only, in which *Dutch* subjects have no interest whatever, for the parties were no settlers there. It is to be presumed, that the representative was not acting without the

the knowledge and permission of his government, if that permission was absolutely necessary to legalize that act. It was not so in my opinion, unless the *Dutch* law involved such persons in its obligations; for otherwise no *Dutch* law was invaded by the act, though the sanction of government might be requisite for the purposes of order and notoriety.

It is, therefore, under all these circumstances that I am called upon to dissolve a marriage of twenty-five years standing, upon a ground of nullity, which is alleged to have existed in its formation, though the *vinculum* has remained untouched, by either party, during the whole time. I know that, in strict legal consideration, I am to examine this marriage in the same way as if it had taken place only yesterday. It is likewise not improbable, that the stability of many marriages may depend upon the fate of this; for, doubtless, many have taken place in a way very similar. But I know that I must determine it upon principles, and not upon consequences. Authority of former cases, there is none: The decision in * *Middleton* and *Janverin* turned upon a ground of impeachment, that was directly the reverse of what is attempted in the present case; for the ground there was, that it was a bad marriage under the *lex loci*, to which it had resorted: So in † *Scrimshire* v. *Scrimshire*, a marriage celebrated according to the *French* ceremonial, and by a priest of that country, but totally null and void, as clandestine, under its law: the ground here is, that it did not resort at all to the *lex loci*.

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* Vid. infra. 437. † Vid. infra. 395.

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In my opinion, this marriage (for I desire to be understood as not extending this decision, beyond cases, including nearly the same circumstances) rests upon solid foundations. On the distinct *British* character of the parties—on their independence of the *Dutch* law, in their own *British* transactions—on the insuperable difficulties of obtaining any marriage conformable to the *Dutch* law—on the countenance given by *British* authority, and *British* ministration to this *British* transaction—upon the whole country being under *British* dominion—and upon the other grounds to which I have adverted; and I, therefore, dismiss this libel, as insufficient, if proved, for the conclusion it prays.



Cases on foreign Marriage referred to in the preceding Judgment.

SCRIMSHIRE *v.* SCRIMSHIRE.*

Consist. 29th *July* 1752.

Validity of marriage of *British* subjects contracted abroad, how far considered, by the law of *England*, to depend upon the law of the country where it is celebrated.—Marriage held to be null and void in this case.

THIS was a suit for restitution of conjugal rights, in which the validity of the marriage was denied, as being a foreign marriage, not celebrated according to the laws of the country in which it was contracted. The question appears to have been then brought, for the first time, to judicial determination in the Ecclesiastical Court; and the effect of that decision, in legal authority, has been the subject of much discussion in subsequent cases. It is introduced here, with the two following sentences on the same subject, as elucidating the references to former authorities, on this important subject, in the preceding case.

JUDGMENT.

Sir *Edward Simpson.*—This is a case, *primæ impressionis*, and of great importance, not only to the parties, but to the public in general. The suit is brought by Miss *Jones*†, for restitution of conjugal rights. She pleads a marriage in *France*, clandestine and forbidden by the laws of both countries, with this difference, that, by the laws of *France*, such marriages are, in all cases, absolutely null; whereas, by the laws of *England*, they are only

* This case is printed from a MS. note of Sir *Edward Simpson*, communicated by Dr. *Swabey*.

† This lady was the daughter of *Theophilus Jones*, Esquire, Accountant General of the Bank of *England*.

irregular,

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irregular, but not null, unless under special circumstances that warrant the Court to put that construction upon them. An allegation has been given in on the part of Mr. *Scrimshire*, which pleads, that he was drawn in by surprise and terror to marry; that the marriage was celebrated in *France*; that by the laws of *France*, the marriage of minors under twenty-five, unless with the consent of parents, is null and void; and that marriage can only be legally celebrated in that country by the proper Priest, licensed to marry and exercise his functions within the jurisdiction where the parties live: That he was a minor, about eighteen; that Miss *Jones* was about fifteen: That the marriage was solemnized in a private house, by a Priest not authorized, and without the consent of parents: That, under these circumstances, the marriage was null by the laws of *France*. A sentence of the Parliament of *Paris*, declaring the marriage null, is also pleaded, not as a bar to entering into the question in this Court, Whether the marriage be good or not, but as evidence of the law of *France*, which may be material for the consideration of this Court in determining, whether this be a good marriage by the law of *England*, or not.

Before I enter into the merits of the case, I shall take notice of some preliminary objections that have been made by the counsel. Upon the return of the citation *viis et modis*, on the 23d of *June* 1749, Mr. *Bogg* appeared for Mr. *Scrimshire*. On the 26th *October* 1749, a libel was given in by Miss *Jones*, and admitted. On the same day, Mr. *Bogg* exhibited a special proxy, and contested suit negatively. And it has been insisted, that

that by such absolute appearance, without protest, he had submitted entirely to the jurisdiction of this Court; and that the matter should be determined by the laws of this country, without any regard to the laws of *France*; and that he had waived all right to any benefit, that might be derived from the sentence, which has been passed on this marriage in *France*.

It is further insisted, that after an absolute appearance, he had alleged the sentence in *France* to be a bar to any further proceedings; and that the Court, having overruled that plea, the sentence of the Parliament of *Paris*, and the *French* laws, were entirely out of the case; and that the question before the Court, Whether this is a good marriage or not, ought to rest solely on the *English* law, with respect to clandestine marriage, without any regard to the *French* law on that subject. This is the inference made by counsel. But, I apprehend, these consequences, as drawn by them, will not follow from Mr. *Bogg*'s absolute appearance, nor from the Court's rejecting the plea offered by him as a plea in bar.

This is a cause for the restitution of conjugal rights. Mr. *Bogg* appears to the citation, &c. and denies the marriage. This surely is not a waiver of his client's right under the *French* law, but rather an assertion of it. The process is for restitution of rights; and the marriage being denied, a question arises incidentally, Whether it is a marriage or not,—to determine whether the party is entitled to restitution or not, under the marriage which has been pleaded. Mr. *Bogg* pleads a sentence at *Paris*, in bar to entering further

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further into the question of a marriage or not. This surely is far from waiving any right under the sentence, for he insists upon the force and effect of the sentence. The Court was of opinion *then*, and still is, that a foreign sentence alone could not, of itself, be a bar to entering into a consideration of the question, Whether this marriage between *English* subjects was good or not by the law of *England?* The Court thought, however, that such sentence was proper to be pleaded, as a circumstance, or a fact, to make evidence of the law of *France*, with respect to the question here, on the validity of a marriage celebrated in *France*. Accordingly, the sentence was pleaded, and admitted in that light; and in that light it seems to be very properly before the Court; as I think the laws of *France* are very material to be considered, in determining, even by our law, on the validity of a contract of marriage had and made in *France*. So that the Court, by rejecting the sentence when pleaded in bar, has not determined, that the sentence in *France*, when pleaded as a circumstance, is of no avail. Neither has Mr. *Bogg* waived all benefit of the sentence, by appearing absolutely, and pleading the sentence as a circumstance, which is evidence of the law of the place where the marriage was had, and will, in my opinion, be material in considering the points, on which the case depends.

The general questions are two: — 1st, Whether there be full and legal proof that the parties did mutually, freely, and voluntarily celebrate marriage, in such a manner as the laws of this country would deem to constitute marriage, if there was nothing

nothing else in the case, but a question on the fact of the marriage.—2dly, Whether, if the fact of the marriage should be proved, this marriage can, by the laws of this country, be effectuated, and pronounced to be good, being solemnized in *France*, where by law it is null and void, to all intents and purposes? For it seemed to be admitted in the argument that the law was so; but insisted, that it ought not to be a rule of determination, in this cause.

As to the fact of marriage, it is to be observed, that it is a marriage between minors,—that it is a clandestine marriage, in a private house,—not by the regular priest;—that it is unfavourable, and discountenanced by the laws of both countries: and if there had not been a special act of grace, none of the persons present at the marriage could have been, in this case, legal witnesses to prove it; since it is the constant practice in Ecclesiastical Courts, to repel the testimony of persons present at clandestine marriages, till they have been absolved. Persons present at such marriages are excommunicate *ipso facto*: and in our Courts, it is not thought necessary to have a declaratory sentence of an excommunication *ipso facto*, for the Court can *ex officio* take notice of it. The practice on this point has been confirmed by constant use, under the received maxim, that *lex currit cum praxi*; and it has been so determined lately by Dr. *Andrew* in the case of *Collis*.

It is to be observed that this marriage was performed by a *Romish* Priest, according to the *Roman* ritual. The *Romish* Church acknowledges several orders; though Bishops, Priests, and Deacons, corresponding to those orders in the Church

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at *Rome*, are only allowed by us; and in the form of making and consecrating Bishops, 3 & 4 *Edw.* 6, c. 12. 5 & 6 *Edw.* 6, c. 1. s. 5. 13 & 14 *Car.* 2, c. 4. it is declared, that no man "is to be accounted or taken to be a lawful "Bishop, Priest, or Deacon, or suffered to "execute any function, except he be admitted "thereto, according to the form following, or hath "had *formerly* episcopal ordination and conse-"cration."

Bishop *Gibson* observes, that this last clause was designed to allow *Romish* converted Priests, who had been before ordained by a Bishop, that such Priests might be received without reordination; namely, that they might be received to exercise the functions of a Priest, and to do the duties of the *English* clergy—but not to allow them to celebrate marriage according to the *Roman* ritual;—for by the law of this country, it is, I apprehend, prohibited under severe penalties, for a *Roman* Catholic Priest to be in this country, and to exercise any part of his office as a Popish Priest in this kingdom. But as a Priest popishly ordained is allowed to be a legal Presbyter, it is generally said that a marriage by a Popish Priest is good; and it is true, where it is celebrated after the *English* ritual, for he is allowed to be a Priest. But upon what foundation a marriage after the Popish ritual can be deemed a legal marriage, is hard to say. Indeed the canon law received here, calls an absolute contract *ipsum matrimonium*, and will enforce solemnization according to *English* rites; but that contract, or *ipsum matrimonium*, does not convey a legal right

* 11 & 12 *W.* 3. c. 4. s. 8. Repealed 18 *G.* 3. c. 60.—31 *G.* 3. c. 32.

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to restitution of conjugal rights, though an *English* Priest had intervened, if it were otherwise than according to the *English* ritual. Upon what reason or foundation then should a contract of marriage entered into by the intervention of a Popish Priest, not in the form prescribed by law, be deemed a legal marriage in this country, more than any other contract, that is considered, by the canon law, as *ipsum matrimonium?*

There may be other instances, but I have not met with any but that of *Arthur v. Arthur* *, where a marriage by a Popish Priest, by the *Roman* ritual, has been pronounced for: but that was a marriage in *Ireland*, between parties, both Catholics, where the laws with respect to Papists are different; which laws, as the laws of the country in which the contract was made, the Court would respect. And in that case, there was consummation, that purified any condition in the contract. There can be no doubt, but that a marriage here by him who is in allowed orders, according to the *English* ritual, would be good by our laws. But I much doubt whether a marriage *in England* by a *Romish* Priest † after the *Romish* ritual, would be deemed a perfect marriage in this country: the act of Parliament having prescribed the form of marriage in this country, and changed that condition, in the con-

* This was a Case of Appeal from the Consistorial and Metropolitical Court of Dublin, in a suit of restitution of conjugal rights on the part of the wife, in which the lawfulness of the marriage was denied on the other side, "as contrary to the laws, statutes, and canons, and the provisions of the act of parliament (*a*) in Ireland, for the prevention of clandestine marriages of minors of certain estate and condition," &c.—The Court below had pronounced the libel of the wife not proved; but the Delegates reversed that sentence, and decreed to the effect of her prayer.

Deleg: 24 *June* 1720.

(*a*) 6 *Anne*, c. 16. See also 12 *G.* 1. c. 3. 19 *G.* 2. c. 13.

† But see the proof of marriage by a Popish Priest of the Imperial Envoy, in *Fielding's* case for bigamy, A. D. 1706. State Trials, vol. 14. p. 133, 4, *et seq.*

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tracting part, in the *Roman* ritual, "*if Holy* "*Church permit,*" to "*according to God's Holy* "*Ordinances;*" and acts of Parliament having prohibited to *Roman* Catholic Priests the exercise of their functions. And I apprehend, unless persons in *England* are married according to the rites of the Church of *England*, they are not entitled to the privileges attending legal marriages, as *thirds, dower, &c.* How can a Bishop try or certify such a marriage?—Can he certify that *English* subjects, residing in *England*, were lawfully married according to the laws of *England*, if they were not married according to the rites prescribed by act of parliament, for marriages in this country.—Would a contract only by the intervention of a *Romish* Priest, or any Priest, be deemed a legal marriage? The *Roman* Ritual not being the same with ours, such a ceremony is nothing more than a contract.

What I have said relates only to marriages in *England* by Popish Priests. For there can be no doubt but a marriage properly celebrated abroad, by a Popish Priest, after the *Roman* ritual, would be deemed here a good marriage; for I apprehend, that by the law of *England*, marriages are to be deemed good or bad, according to the laws of the place where they are made. It has been determined at common law, that if a man marries two wives, the first in *France* and another here, he may be tried and indicted here for that as felony*; therefore, a marriage in *France* is deemed a good marriage, though not agreeable to our law; for in matrimonial causes, all laws take notice of the law of other countries.

As to the proofs relating to the asserted marriage, in the present case, it is not necessary to state them particularly. It is in proof from the

* *Kelyng*, 79. 1 *Siderfin*, 171, *vid. infra*, p. 416.

wit-

witnesses, and the answers of Miss *Jones*,—that the parties became acquainted in *June* 1741;—that Mr. *Scrimshire* went two or three times afterwards to *France* and visited her; that he was intimately acquainted with her, had great attachment to her, and expressed a great desire to marry her. He proposes marriage,—buys a ring,—and applies to persons to get a Priest to marry them, and declares his intention to marry. Three witnesses speak to the fact of the marriage, and all of them swear that it was free and voluntary.—He goes home and returns to be married,—which shews that it was done voluntarily. The paper, which is all of his own handwriting, and which is proved by *Keating*, the only surviving witness, to be free and voluntary, owns her to be his wife.—He claims her two or three days after the marriage,—owns her to be his wife, but desires that it might be kept secret. He made declaration to Mr. *Asgel* in 1744, that, if it was to do over again, he would marry her. In *June* 1749 there is a recognition, when he seriously owned her to be his wife, to her brother and Major *Blagney*. There were also many declarations on her side,—and there is not a tittle of proof, of any force or terror having been practised upon him, though it was pleaded.

The witnesses to the marriage indeed are not of the fairest character. The general character of the Priest is bad. There has been a sentence against *Macgrah*, condemning him to the Galleys. They were all present at a clandestine marriage; which in some measure affects their credit, and would have gone to their competency, had it not been for the act of grace. They differ in some circumstances. The Priest says, "that it was after

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"the *Roman* ritual." *Macgrah* and *Keating* and *Jones* say, "that it was after the *English* ritual." The form is pretty much the same, they might mistake, — but I am inclined to think that it was after the *Roman* ritual. — *Macgrah* says, "the "priest set out for *Bologne* before *Macgrah*, and "he did not see him again till he came into the "room." The Priest says, "they set out together "and arrived in the evening. — That *Macgrah* left "him and returned in three hours to the inn, and "carried him to Mrs. *Dunbar*'s house." *Macgrah* says, "*Bagot* gave the Priest five guineas." The Priest says "*Macgrah* did this." *Macgrah* says, "*Cummins* asked the parties if they continued in the "resolution to marry." *Keating* says, "that *Bagot* "asked that question." *Cummins* says, "*Macgrah* "asked it," and there are some other differences. But yet on the whole evidence taken together, there seems to be full proof of affection, courtship, recognition, and a fact of marriage, by the intervention of a priest; without which undoubtedly, by our law, it could only be a contract. The Priest swears, "that he was ordained a priest, and is so, "and he is reputed as such." And though his orders are not produced, yet I apprehend that this evidence is sufficient to make legal proof of it; in which I am warranted by the determination in *Arthur's* case, where a marriage by a Popish Priest was pronounced for, it having been sworn, "that "he was ordained and reputed so."

By the particular municipal laws of this country, a clandestine marriage by a Popish Priest after the *English* ritual, is not void, though irregular, though the Priest and the parties marrying, and present at it, may

may be liable to punishment for a breach of the law. But I am not satisfied, as I have before intimated, that a marriage in this country by a Popish Priest, after the *Roman* ritual, could be deemed a good and legal marriage; — especially where there has been no consummation. But as this marriage was had abroad, where the *Roman* ritual is in use, I should have had no doubt in pronouncing for it, had there been evidence, that it was a marriage agreeable to the laws of that country.

But the great difficulty arises on the second question, from the marriage being celebrated in *France*, where, as it appears from *Young*'s evidence, and the sentence of the Parliament of *Paris*, such marriage is null, by the laws of *France*. It has been much insisted on, however, that the laws of *France* are of no consideration in this case, the parties being both *English* subjects, and not domiciled in *France*, — which alone, as is contended, could subject them to the *French* laws.

The general principles which have been referred to on the subject of domicil are, that a minor son is domiciled where his father lived, until the son comes of age, or settles in another kingdom; — that domicil by birth is presumed to continue till the contrary is proved; — that *he* only is said to have changed his domicil, "Quando quis re & facto animum manendi declarat;" and that "domicilium non procedit, si ille haberet animum revertendi:" and therefore, "Qui studiorum causa aliquo loco morantur, non domicilium ibi habere creduntur;" — that minors who may be with a mother or guardian in another country, or may be carried there by a mother's orders, cannot be said to have an intention to change their domicil, or to have a mind to be domiciled there; and "requiritur neces-

 "sario

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"sario animus ut domicilium acquiratur,—et "domicilium ex animo contrahitur, et pendet ex "animo." *

With respect to Miss *Jones*, it is contended, that she is by birth *English*, and that her father is now living; that she has no estate in *France*, and is to be considered as domiciled in the country where her father lives; that there is no proof shewing any intention on her part to change her domicil; that she only went to *France* to visit a relation by order of her father, and for education; and had been there about eighteen months; and being a minor, could have no *animus manendi* longer than her father would permit, particularly at the house of her aunt Mrs. *Dunbar*, where she was only a lodger; that she must be considered, on principles of legal construction, as being there, for temporary purpose only, and with the *animus revertendi*.

With respect to Mr. *Scrimshire*, it is said—that he was also a minor, by birth domiciled in *England*, where his father died; that he had no estate in *France*, and is to be presumed to be domiciled in *England*, the contrary not being proved; that he had gone to *France*, on several occasions, to visit his mother, who had been living in *France* about two years and a half, and the last time he went, about fourteen days before this marriage, in order to proceed to *Angiers* for education; that the *animus revertendi* was to be presumed as to him as much as any traveller, and there was no act done by him, or declaration, which shewed that he had an intention to stay there, or any thing from

* C. 10. 39. de Incolis, &c. l. 2 & 7.

D. 50. 1. ad municipalem & de Incolis, l. 27. § 1. and many other authorities, especially Mascardus de Probationibus, conclus. 534.

which

which such an intention can be inferred. The mother, as guardian, could not, by obliging him to live with her, effect a change of his domicil, since there could be no *animus manendi,* if it was done by order and constraint; and "*ex animo domicilium contrahitur.*" On these representations it is insisted, that both parties being subjects of *England,* born here, and sent over to *France* for education, and not having any estate, on which the marriage in *France* could operate there, a residence such as there appeared to be, could not give a foreign Court any jurisdiction; for that if it did, the consequence would be, that the right of *English* subjects must be tried by foreign law, and the estates of *English* subjects, lying in *England,* must be governed by *French* law, which is not to be endured. This was, in general, the purport of the argument for Miss *Jones.* But I apprehend the case in judgment before me does not turn or depend on the mere question of domicil. The question before me is not, whether *English* subjects are to be bound by the law of *France*; for undoubtedly no law or statute in *France* can bind subjects of *England,* who are not under its authority; nor is the consequence of pronouncing for or against the marriage, with respect to civil rights in *England,* to be considered in determining this case. The only question before me is, whether this be a good or bad marriage by the laws of *England?* and I am inclined to think that it is not good.

On this point I apprehend that it is the law of this country, to take notice of the laws of France, or any foreign country, in determining upon marriages of this kind. The question being in substance this, whether, by the law of this country, marriage contracts are not to be deemed good or

 bad,

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bad, according to the laws of the country, in which they are formed; and whether they are not to be construed by that law? If such be the law of this country, the rights of *English* subjects cannot be said to be determined by the laws of *France*, but by those of their own country, which sanction and adopt this rule of decision. By the general law, all parties contracting gain a forum in the place, where the contract is entered into. All our books lay this down for law; it is needless at present to mention more than one. *Gayll*, lib. 2. obs. 123. says, "In contractibus locus contractus "considerandus sit. Quoties enim statutum prin-"cipaliter habilitat, vel inhabilitat contractum, "quoad solemnitates, semper attenditur locus, in "quo talis contractus celebratur, et obligat etiam "non subditum." And again, lib. 2. obs. 36. "Quis forum in loco contractus sortitur, si ibi loci, "ubi contraxit, reperiatur; non tamen ratione "contractus, aut ratione rei, quis subditus dicitur "illius loci, ubi contraxit, aut res sita est; quia "aliud est forum sortiri, et aliud subditum esse." "Constat unumquemque subjici jurisdictioni judi-"cis, in eo loco in quo contraxit."

This is according to the *text* law, and the opinion of *Donellus* and other commentators. There can be no doubt, then, but that both the parties in this cause, though they were *English* subjects, obtained a forum, by virtue of the contract, in *France*. By entering into the marriage contract there, they subjected themselves to have the validity of it determined by the laws of that country. So long as they resided there, each party might sue the other, and bring the case before that jurisdiction, to be determined by the law of *France*. And this cause seems to have

been begun very properly in *France* against Miss *Jones*, while she was resident in *France*, and subject to that forum, in order to have it tried by its proper forum. For it appears that Mrs. *Scrimshire*, the mother of the minor, protested of the nullity of the marriage, by a protest, in which she gives a large account of the transaction, on the 3d *March* 1744; and this protest was personally notified to Miss *Jones* in *France*.

It appears further, that Mrs. *Scrimshire* having had notice, that some affidavits and a certificate of marriage were enrolled in an office in *France*, on the 13th *March* 1744, petitioned the Seneschal, setting forth the protest and clandestine marriage, and the enrolment of the affidavits, acts, and certificate; and prayed to have the acts, &c. communicated to her, in order that she might draw such conclusions from them, as might be lawful, in the proceedings to be had in regard to her son; and that the acts might be brought to be inspected by the judge for that purpose; and declared her intention to prosecute the parties for the *raptus seductionis*, as it is termed in the laws of *France*. On the 14th *March* this was likewise notified personally to Miss *Jones*, and in her answer she admits that she had such notice.

A proctor appears there for Miss *Jones*, and alleges, that she was a minor, and not properly cited, being a foreigner. His objection was overruled; and I must suppose lawfully. The Seneschal orders the acts, &c. to be delivered to *Bagot*: he giving security to produce them on an appeal. From this sentence, Mrs. *Scrimshire* appeals to the official of *Bologne*, and sets forth the decree, and that she is materially interested to cause the marriage to be annulled; and prays that the acts may be brought

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brought into Court, which are necessary to prove the marriage fraudulent, for the purpose of annulling it; and protests of presenting a petition to him for that purpose. The Official inhibits the Seneschal from delivering out the papers; but the Official having only authority over the Seneschal, and to try the validity of the marriage, and not having criminal jurisdiction, it was thought proper to drop that proceeding by the advice of counsel, and to proceed before the Parliament of *Paris*, where effectual justice could be done, by securing the papers, and punishing the parties guilty of the *raptus seductionis*, and the marriage might also be annulled. On the 18th *April* 1744, an appeal was accordingly interposed "from the sentence of the "Seneschal at *Bologne*, and from the celebration "of marriage."

All this appears from the proceedings; and I am to presume, that it was agreeable to the laws of *France*. The criminal proceedings for the *raptus seductionis* lasted from the 18th *April* 1744 to the 27th *February* 1749. On which last day, the *French* subjects, who had been privy to this transaction, were condemned to the galleys; and Miss *Jones* and others were banished for five years. And on the 26th of *August* 1749, the marriage was annulled.

It has been much insisted, in argument, that a citation was taken out here in *June*, before the sentence at *Paris*, and that an absolute appearance was given by Mr. *Bogg then*. But it is to be observed, that issue was not joined till the 26th *October* 1749, after the sentence, and that the appeal to the Parliament of *Paris* was in *April* 1744. And I do not apprehend that the mere appearance given here by Mr. *Bogg*, before the sentence in

France,

France, is, in point of law, a waiver of proceedings in *France*, or of the law of *France*, or an electing of another Court.

The suit here is for restitution of conjugal rights, and a sentence in *France* is not of itself a bar to such suit. It is only evidence of what the *French* law is, by which the Court is to try the validity of the marriage, or contract. If there had been no sentence in *France*, the party might have shewed, that it was not a good marriage by the laws of *France*; and he might equally have denied the marriage, whether there had been proceedings and sentence or not at *Paris*; as I take it to be clear, that both parties in the cause had obtained a forum in *France*, where the marriage contract was entered into; and by marrying there, had subjected themselves to be punished by the laws of the country for a clandestine marriage; and had also subjected the validity of the contract to be tried by the laws of that country; as the contract itself, or the marriage, being according to the form of that country, was meant to be a marriage, or *not*, according to the laws of that country, which is still more strongly shewn in this case, by inserting the words, *If Holy Church shall it admit.*

I must observe, also, that the suit was commenced against Miss *Jones*, concerning the marriage in *France*, before she left that country; for, from the beginning, the proceedings by Mrs. *Scrimshire* were in order to annul the marriage: and though Miss *Jones* left *France* before the direct question on the marriage was brought before the Court in *France*, yet she was there during the time when Mrs. *Scrimshire* was taking proper steps to annul the marriage, and, on that account, I must consider

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the cause as begun against her before she left *France*, and when undoubtedly, by her residence and marriage, she was subject to the jurisdiction of that country. She ought, therefore, to have staid in *France*, to have defended her rights there. She might have done so, notwithstanding the war. And there have been instances of persons doing so in this country.

As both the parties, by celebrating the marriage in *France*, have subjected themselves to the law of that country relating to marriage; and as their mutual intention must be presumed to be, that it should be a marriage or not, according to the laws of *France*, I apprehend it is not in the power of one of the parties, by leaving the place, to draw the question of the marriage, or contract, "*ad aliud examen*," to be tried by different laws, than those of the place where the parties contracted. They may change the forum, but they must be tried by the laws of the country which they left. This doctrine of trying contracts, especially those of marriage, according to the laws of the country where they were made, is conformable to what is laid down in our books, and what is practised in all civilized countries, and what is agreeable to the law of nations, which is the law of every particular country, and taken notice of as such.

This subject is much discussed by *Sanchez* *, to the following effect, that as to the maxim or general rule, "Ut non teneantur peregrini legi- "bus et consuetudinibus loci per quem transeunt," this rule has exceptions; "1st, Quoad con- "tractuum solemnitatem; nam quicunque forenses, "et

* De Matrim. lib. 3. de clandestino consensu. Disput. 18. § 10.

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" et peregrini tenentur servare solemnitates in con-
" tractu requisitas legibus et consuetudinibus oppidi
" in quo contrahunt; ratione enim contractus qui-
" libet forum sortitur in loco contractus; hinc est
" contractum absolutè initum, censeri celebratum,
" juxta consuetudines et statuta loci in quo initur.
" Quod ita provenit, quia contractus sequitur con-
" suetudines et statuta loci in quo celebratur." And a case * is put, as to inhabitants of a place where the decree of the Council of *Trent*, for avoiding clandestine marriages, is not received; suppose from *England* they go to places "*per modum transitus, ubi* " *obligat decretum*," and marry there according to the laws of their own domicil. Some think that such marriage is good in the case of strangers, as agreeable to their own laws, to the law of the country in which they are domiciled, though not to the law of the place where they are married. But *Sanchez* thinks the marriage void, because it wants the solemnities, " quæ petunt leges loci ubi contractus initur; et " quoad solemnitatem adhibendam in contractibus, " solæ leges loci in quo contractus celebratur in- " spiciuntur." These authorities fully shew, that all contracts are to be considered according to the laws of the country where they are made. And the practice of civilized countries has been conformable to this doctrine, and by the common consent of nations has been so received.

The cases mentioned in the *French* Advocate's opinion, as well as that quoted by Dr. *Pinfold*, from the *journal des audiences, lib.* 1. *c.* 24., establish this principle. It is likewise said, that if the inhabitants of a country where clandestine marriages

* Ibid. § 27.

are

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are forbid, go to a country where they are allowed, and marry there *in transitu*, the marriage is good; "peregrinos a domicilio absentes non "teneri legibus illius, si contrariæ vigeant in loco "ubi reperiantur." According to this authority also it is plain that the laws of the country where a marriage is celebrated, are to be the rule by which the validity of it is to be tried.

*Voet** also puts the point in the same manner. "Qua solemnitate, quibus modis, contractus quis- "que celebrandus sit, quando solemniter initus ac "perfectus intelligatur, ex lege loci in quo con- "tractus celebratur dijudicandum est; non vero "ex statutis regionis illius, ubi sitæ sunt res im- "mobiles, circa quas, primario, aut per consequen- "tiam, contractus versatur." *Mynsinger*† also "may be cited to the same effect.

And a case is stated of a *French* man of *Paris* and a minor going to *Lorrain* and marrying there according to law; the wife has a child, and then leaves *Lorrain* and goes to *Paris* and claims her husband. His friends institute a criminal prosecution to annul the marriage for want of consent of parents. One Court thought this marriage the *raptus seductionis*; but on an appeal, the Parliament reversed that determination.

* Voet in Dig. lib. 23. tit. 2. n. 85. fol. 55.

† Singul. Observat. cent. 5. obs. 20. n. ult. "Si quis in loco "aliquo actum gerens, neglectis loci illius solemnibus, adhibuerit "ea quæ vel domicilii vel rei sitæ statuta requirant, sive diversa illa "sint sive pauciora —— Ita gesta nullius fore momenti pronunciat, "sive actum gerens extra domicilii locum servaverit solemnia do- "micilii, sive ea quæ requirebantur in loco rei immobilis sitæ."

This passage appears to be an abstract of the substance of the chapter, and not an extract from *Mynsinger*.

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So in *Holland*, *Voet* says *, if an inhabitant of *Holland* contract a marriage in *Flanders* or *Brabant*, with a woman of the country, observing those rites which by the laws of *Flanders* or *Brabant* are required, it would appear that such marriage would be deemed good in *Holland*, " eo quod " sufficit in contrahendo adhiberi solemnia loci " illius, in quo contractus celebratur, etsi non in- " veniantur observata solemnia, quæ in loco domi- " cilii contrahentium, aut rei sitæ, actui gerendo " prescripta sunt." And the States of *Holland* have given two sentences in that manner. His own opinion however is, that the marriage was bad, not upon general principles of law, but on account of a particular and positive law in *Holland*, which makes all marriages whatever of *Dutchmen*, wherever they be, void, unless the banns are published in *Holland*.

As to the practice of *England*, there is the case quoted by Dr. *Paul* of Miss *Fairfax*, daughter to Lord *Fairfax*, who was publicly married to Lord *Abergavenny* at *Paris*, she being a minor, and not having her mother's consent. A suit was instituted before the Parliament of *Paris* to annul the marriage; and it was annulled. She came to *England*, and was maid of honour to King *James*'s Queen, and was afterwards married to Sir *Charles Carter*; and Lord *Abergavenny* married Lord *Bellasis*' daughter. This shews, that in marriages abroad by *English* subjects, the *English* law takes notice of the foreign law. For if the *French* sentence in that case, was not to be taken notice of here, they might both have been prosecuted for bigamy,

* Voet in D. lib. 23. de ritu nuptiarum, tit. 2. n. 4. fol. 20.

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bigamy, and the children of the second marriage would have been bastards.

Kelyng also lays it down, that if a man marries in *France* and afterwards here, his first wife being living, he may be prosecuted for felony. And for this reason — because the law takes notice of foreign marriage. *

So where a foreign issue which is local arises, it may be tried here by a jury, according to the laws of the foreign country; and upon *nihil debet* pleaded, the laws of that country may be given in evidence. †

Why may not this Court then take notice of foreign laws, there being nothing illegal in doing it? From the doctrine laid down in our books — the practice of nations — and the mischief and confusion that would arise to the subjects of every country, from a contrary doctrine, I may infer that it is the consent of all nations, that it is the *jus gentium*, that the solemnities of the different nations with respect to marriages should be observed, and

* This question was moved to me at the *Old Bailey*, a man marrieth two wives, one in *France* and another in *England*, whether he may be indicted and tried for that felony here in *England*; and I took this difference, that if his first marriage was in *France*, and the second marriage, which maketh the felony, was in *England*, then I was of opinion that he might be indicted and tried here for it, and the jury might on evidence find his first marriage in *France*, being a mere transitory act, and having nothing of felony in it; and our juries usually find such transitory acts, though they are done in a foreign nation; but if the first marriage was in *England*, and the second in *France*, then I was of opinion that he could not be tried for it here; because the act which made the felony, was done in another kingdom, and felonies done in another kingdom are not by the common law triable here in *England*. *Kelyng*'s Rep. page 79.

† 2 *Salk.* 651. 6 *Mod.* 195. S.C.

that

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that contracts of this kind are to be determined by the laws of the country where they are made. If that principle is not to govern such cases, what is to be the rule, where one party is domiciled, and the other not? The *jus gentium* is the law of every country, and is obligatory on the subjects of every country. Every country takes notice of it; and this Court observing that law in determining upon this case, cannot be said to determine *English* rights by the laws of *France*, but by the law of *England*, of which the *jus gentium* is part.

All nations allow marriage contracts; they are "*juris gentium*," and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion, that must necessarily arise to the subjects of all nations, with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. It is of equal consequence to all, that one rule in these cases should be observed by all countries—that is, the law where the contract is made. By observing this law, no inconvenience can arise; but infinite mischief will ensue if it is not. For instance—supposing this marriage should be declared good, might not Mr. *Scrimshire* nevertheless go into *France*, and marry another woman there, the first marriage being null there: he might come into *England* after his marriage in *France*, and live here, and could not be prosecuted for bigamy,

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bigamy, according to *Kelyng*; for the felony, being done abroad, could not be tried here. The consequence of which would be, that he might have two wives, and might have lawful issue by both in different places. His children in *France* would be bastards in *England*, but would be legitimate in *France*, and might inherit there; and the children by *Jones* would be legitimate in *England*, but bastards in *France*, and would not inherit there. The *French* woman, that he married in *France*, would have no right to *English* effects, for *Jones* is the lawful wife here. *Jones* would have no right to *French* effects, for she is not the lawful wife in *France*. And if, as it may happen, after they have had children, both should go to *France*, and should marry again, and have children in *France* —what infinite confusion would attend all these consequences of such a principle, to the great detriment and inconvenience of themselves and their issue, and the subjects of both countries?

Again—If countries do not take notice of the laws of each other with respect to marriages, what would be the consequence if two *English* persons should marry clandestinely in *England*, and that should not be deemed a marriage in *France*? Might not either of them, or both, go into *France* and marry again, because by the *French* law such a marriage is not good? And what would be the confusion in such a case? Or again—Suppose two *French* subjects, not domiciled here, should clandestinely marry, and there should be a sentence for the marriage; undoubtedly the wife, though *French*, would be entitled to all the rights of a wife by our law. But if no faith should be given to that sentence in *France*, and the marriage should

 be

be declared null, because the man was not domiciled; he might take a second wife in *France*, and that wife would be entitled to legal rights there, and the children would be bastards in one country and legitimate in the other. So that in cases of this kind, the matter of domicil makes no sort of difference in determining them; because the inconvenience to society and the public in general is the same, whether the parties contracting are domiciled or not. Neither does it make any difference, whether the cause be that of contract or marriage; for if both countries do not observe the same law, the inconveniences to society must be the same in both cases. And as it is of consequence to the subjects of both countries, and to all nations, that there should be one rule of determining in all nations on contracts of this kind, it is to be presumed, that all nations do consent to determine on these contracts, by the laws of the country, where they are made; as such a rule would prevent all the inconveniences that must necessarily arise from judging by different laws, and is attended by no manner of inconvenience, but is for the advantage of the subjects of all nations.

In the present case, there has been a sentence of the proper forum, pronouncing on the whole facts of the case, and the principles of the laws of *France*, as applied to them. In matters that belong to the *jus gentium*, our Courts always regard the sentences of a proper Court. As to sentences in *England*, by a proper Court, on a matter within its jurisdiction, without doubt they may be pleaded in bar to a suit here for the same matter.

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The probate of a will, or a sentence for or against a marriage in the Ecclesiastical Court, will be received in bar, where the same is attempted to be drawn into dispute at common law. But the law of this country goes farther than the sentences of our own Courts. If an *Englishman* makes a will abroad, and makes a foreigner executor, and has no effects in *England*, and the executor proves the will lawfully abroad, that probate or sentence of the proper court establishing the will, as to effects there of a man domiciled there, would be a bar to a discovery in Chancery of effects abroad.

In commercial affairs, under the law merchant, which is the law of nations, there are instances, where sentences for or against contracts abroad, have been given, and received here on trials, as evidence, and have had their weight. And this has been allowed on a principle of the law of nations, which all countries by consent agree to, for the sake of carrying on commerce which concerns the public in general. There are instances of the same kind in the Court of Admiralty; the sentences of all Courts of Admiralty are taken notice of by one another; they are obligatory by the law of nations. By the mutual consent of all nations they take notice of one another's sentences, and give mutual faith to their proceedings. All courts of admiralty in Europe are governed by the same law,—the law of nations. And it is just, by the law of nations, for nations to be aiding and assisting to each other. And therefore, as the law of *England* takes notice of the law of nations in commercial and maritime affairs; because all countries are interested in those questions;

tions; and as all countries are equally interested to have matrimonial questions determined, by the laws of the country where they are had, and the mischief would be infinite to the subjects of all nations if it was not so; I am of opinion, that this is the *jus gentium* of which this and all courts are to take notice.

The principle and rule of law, as laid down in our books, is,

"Quod justæ nuptiæ solum dicuntur, quæ ritè "et secundum præcepta legum contrahuntur.

"Quod non dicuntur conjuncti, qui contra leges "juncti sunt.

"Quod contra jus non sunt nuptiæ."

And *Lindwood* says*, "verum est quod ubi "lex vel statutum resistit obligationi, tunc nec "initur civilis, nec naturalis obligatio. Ratio est "quia obligatio naturalis dicitur de jure gentium. "Sed de jure gentium debemus obedire majori-"bus, ille ergo qui contrahit contra præcepta "legum, facit contra jus gentium, unde merito "non obligatur etiam naturaliter."

So that it is certain, that by the law of all countries, a contract against law has no moral or natural obligation.

Therefore, under the circumstances of this case, as here is satisfactory evidence from the proceedings and sentence in *France*, and from the evidence of witnesses, that this marriage was celebrated in *France*, contrary to the laws of *France*, and is null, and not obligatory, either *civiliter* or *naturaliter*, by the laws of *France*; as there is no positive

* Fol. 155. lib. 3. tit. 9. de locato et conducto v. non teneant. et v. obligatur.

 law

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law of this Country, which prohibits the Court from taking notice of the *jus gentium;* and as the law of the country, where the contract is made, seems to me, according to the law of nations, to be the only rule of determining in these cases; I cannot pronounce for the marriage, but must pronounce against it, and dismiss Mr. *Scrimshire* from the suit. But under the particular circumstances of this case, in which there is no doubt that a marriage was had freely and voluntarily; and that this affair has been prejudicial to Miss *Jones,* who is a lady of good character; I shall, agreeably to precedent, give a sum to her *nomine expensarum,* and fix it at £400. The lady may be happy, I hope, in a man that deserves her better; — if she does not think so, it is a great satisfaction to me, that she may have the opinion of better judges.

The Court pronounced for the form of sentence porrected by *Bogg,* viz. " That the Proctor for *Sarah Jones,* calling " herself *Scrimshire,* had not fully and sufficiently founded " or proved his intention, and that the said *John Scrim-* " *shire* ought by law to be dismissed from the instance of " the said *Sarah Jones* as to the matters deduced and " prayed by her in this cause, and from all further obser- " vation of judgment in this behalf."

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2d *Dec.* 1776. Nullity of marriage, by reason of forcible or fraudulent abduction of a ward of very tender age by her guardian: 2dly, of *invalidity* of the ceremony performed, not according to the *lex loci*,—*sustained ultimately on appeal* on the facts applying to the first point: The *Libel* having been *rejected* in the Court of Arches.

THIS was a case of *nullity* of marriage, brought in the Court of Arches by letters of request from the Consistory Court of *St. David's*, on a marriage had abroad, as alleged, contrary to the *lex loci*, between a guardian and ward of very tender age, under circumstances of force or fraud, as pleaded. —The admission of the libel was opposed, and it was rejected; but afterwards admitted on appeal.*

JUDGMENT.

Sir *George Hay*. — This cause comes before the Court in the name of *Frances Mary Harford*, by her guardians *Hugh Hamersley* and *Peter Prevost*, against *Robert Morris*, praying the Court to pronounce for the nullity of marriages, which she admits to have been celebrated, the one at *Ypres* in *Austrian Flanders*, the other at *Ahrensburgh* in *Denmark*, with Mr. *Robert Morris*. In all cases of this nature, it is highly necessary that great caution and deliberation should be observed by the Court, because of the consequences of the nullity of marriage to the parties and to the public. It is of the utmost consequence, therefore, and extremely necessary to allow of every delay, that could be allowed properly, in order to bring the whole circumstances of the case before the Court.

The party *Morris* does not appear here under any protest but absolutely; therefore a libel has been exhibited. In that libel it is stated, that Miss *Harford* is the illegitimate daughter of Lord *Baltimore*, that she is extremely young, was born upon the

* This case is printed from a MS of the whole proceedings collected from the documents in the cause, and from the notes of a short-hand writer, by Mr. *Dodwell*, a very intelligent Practitioner of that time.

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the 28th *November* 1759, and was placed at a boarding-school by *Morris*, who was one of her testamentary guardians. It is alleged, that he first frequently visited her there, wrote notes to her, and formed a scheme of marriage; carried her to public places here in *England*, and conveyed her at last to *France*, and from thence to the *Austrian Netherlands*, thence to *Hamburgh*, thence to *Wandsbeck* and *Ahrensburgh* in *Danish Holstein*. The libel sets forth two marriages, one on the 21st *May* 1772. He went into *France* the 16th of *May*; they had not been on the Continent above five days before they arrived at *Ypres*, and on the 21st of *May* 1772, they were married by a chaplain in the *Dutch* garrison there, in the presence of two witnesses, who are mentioned in the libel, and of other persons. They did not stay in that place more than one night, but went from thence to *Lisle*, from thence to *Holland*, and to *Hamburgh* and other places, and upon the 3d of *January* 1773, a marriage is pleaded to have been had at *Ahrensburgh*, in virtue of a licence from the king of *Denmark*, granted upon the 5th *December* 1772. That is a licence to dispense with all form, and the marriage was celebrated at a private house, in the presence of four witnesses mentioned in the libel; One of these marriages was in the *English* language; One was a public marriage in a church; the other a private marriage by special licence in the presence of witnesses.

The libel sets forth, that they were had contrary to the orders of the Lord Chancellor, and without the consent of the parent or guardians, in evasion of the laws of this realm, and contrary to the laws of those countries where they were celebrated; and upon all or some of those accounts, it

it is prayed at the close of the libel, that the Court would pronounce both marriages to be null.

' The King's Advocate, in arguing this case in *June* last, said, that Miss *Harford*, all circumstances considered, was under force and restraint, and was not *sui juris*; that she must be considered as acting from fear and under imposition; and that, on that account, the marriages were void. He likewise said, that she was seduced; that she was imposed upon by fraud, as well as by violence; and upon that account the marriages were void: and arguments of the same kind have been used by one of the counsel to-day. The Ecclesiastical Court certainly has jurisdiction in all cases whatsoever, with respect to the marriage of *English* subjects, wherever celebrated. If celebrated in any foreign country, and it can be shewn that such marriage was contrary to the general law, to the principles that obtain every where with respect to marriage; that it was under force or restraint of either of the parties; that it was incestuous, or liable to any other impediment, under which, by the law of nations, it is not allowed to marry;—upon any such objection, it is proper to bring a suit of this nature before the Ecclesiastical Judge; and wherever such marriage was celebrated, it may, upon such objection, be set aside. The Ecclesiastical Court has complete jurisdiction to decide the marriages of *English* subjects by the *English* law; and therefore, if there was any thing to shew the marriage void by the general law respecting marriages, or by any particular law of the realm, or that a marriage celebrated in evasion of the law of the realm was to be set aside, if that proposition was anywhere tenable, certainly this Court

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Court has full jurisdiction to enter into the cause of nullity, upon those accounts.

With respect to the behaviour of *Morris*, I have nothing to do with his moral conduct; he is answerable for that to his own conscience; and in other places for his breach of trust, and contempt of the High Court of Chancery; and such proceedings the laws of this country may punish in a proper way; but his having used any arts, or any influence whatsoever, such as entreaties or application by way of courtship, to this young lady, will not, in my apprehension, affect the validity of the marriage which he has contracted with her. What is pleaded in this case? In the twelfth article it is stated, "that after Mr. *Morris* had made use of the "arts aforesaid, that is, by sending notes and cards, "and making appointments, and carrying the young "lady about to public places, and to dinners and to "balls, and to *Ranelagh*, and amusements of that "sort, by the arts aforesaid, he seduced the said "*Mary Harford*, falsely called *Morris*, from the "house of Mrs. *La Touche;* and when he had "gotten her into a coach with him, he, in viola-"tion of his duty and trust, took advantage of the "infancy, ignorance, and inexperience of the said "*Frances Mary Harford*, falsely called *Morris*, and "by divers specious pretences and entreaties, per-"suaded and prevailed upon her to go with him to "*France*." When she was in *France*, at *Bologne*, as it is expressed in the thirteenth article, "she wished she "was at home again;" and it is further pleaded, "that Mr. *Morris* threatened that he would kill him-"self, if she went home again, and that terrified her." No violence to her is pleaded, but he said "that he "would kill himself," unless she would stay with him.

him. The article says, "she consented;" and the question will be, Whether a consent so obtained will vitiate every thing that followed? If she acted under terror at the time when this marriage was solemnized, it might be a good ground to set it aside. But she goes from place to place with him; according to the plea, she goes to *Ypres;* there they sign each of them a declaration, which was not pleaded to be signed under any constraint. But it is pleaded that the declaration is false in fact, that it sets forth dates, and an age not true, and that there was no parent or guardian; but nothing is pleaded whatsoever with respect to force or violence used by *Morris* to make her sign that declaration. It must be taken, therefore, that she signed it voluntarily with regard to the marriage, where the marriage is said to be solemnized.

In what manner did they proceed after the marriage? On the next day they went first to *Lisle*, then to *Hamburgh*, and other places, and were pursued by the guardians as soon as they had got information, which was by a letter he wrote himself, by which they were acquainted with the marriage. The libel then states the order of the Court of Chancery, upon which the guardians went abroad in pursuit of her, but without success; and that they obtained orders from the Court of *France*, and from the Senate of *Hamburgh*, at the time she was there; but still they could not obtain her, as she was gone to *Wandsbeck* in *Denmark;* and she was married at *Ahrensburgh*, on the 3d of *January* 1773.

With respect to what the temper or conduct of *Morris* was, whether exceptionable from the means used to seduce her, there is nothing pleaded, that shews the lady was under any sort of constraint,

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or that any violence was used, or that she was forced to do the acts which she now complains of. It is not stated that she is not of marriageable age. If that had appeared, the libel would be admissible certainly under the general law; but there is no such plea. It is admitted, that though she was extremely young, being born in *November* 1759, she was of marriageable years. It is pleaded, indeed, that he carried THIS CHILD here and there, but she was above twelve years of age and a half.

The Court is to attend only to legal objections, and not to the other conduct of the parties. Is there any legal objection with respect to the marriage? She was of age to consent. It appears upon the plea that she did consent, and the contrary does not appear. She being of proper age, being free, and the marriage voluntary, as appears by the plea, I cannot think there is any ground in that part of the libel sufficient for me to receive it, by way of laying a foundation for a sentence of nullity of marriage.

The next question is, whether by the law of *England* this marriage is valid? It is stated throughout, that it is a marriage without the consent of the natural mother of the party, and of the testamentary Guardians and the Lord Chancellor; and that the parties went into a foreign country to evade the laws of this realm. Whether upon that account, or any of the accounts already mentioned, it is void by the law of *England*, is the first question.

Parties may go out of *England* and marry by necessity or choice; in either way a foreign marriage is not void upon that account by the laws of *England*. But it is said, they go in violation of the order of the Chancellor, and without the consent of parents and guardians.

What

What is the law of *England*, that requires the consent of parents and guardians? It is the marriage act. One of the greatest Magistrates that ever appeared in this country explains it, that the view of that act was to restrain the abuse that was so scandalous in this country from clandestine marriages, and to get proof of marriages, which otherwise might become uncertain; as it is, wherever you cannot have evidence of the fact of the marriage being rightly performed, and legitimacy becomes uncertain. The principal view of that law was to affect such marriages. The law does, indeed, in one respect, put a restraint, which was not known to the common law, upon the marriage of minors without the consent of parents; but it does not make all the marriages of minors, even in *England*, void. Marriages by licence only are void, for want of consent of parents and guardians. If this marriage had been in *England*, and if instead of going abroad, the parties had been married in any great parish of this town or country by banns, would that marriage have been good or not by the laws of *England?* No law says that it shall be void. It is a marriage by licence only that is void by the law of *England*, for want of consent of the parents or guardians.

It is observed also, that the act makes particular exceptions, without which the purpose of the marriage act, though an exceeding good act, might have been questioned before this time, if there had not been so many ways to avoid the restraint put upon the marriage of minors. It is provided, that nothing in this act shall extend to marriages in *Scotland*, nor to any marriages solemnized beyond sea. Then marriages in *Scotland* and beyond sea by the law of *England* remain in the same state,

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as if the statute had not passed. Marriage in *Scotland*, if not contrary to the law of *England*, is good, and it has been so determined.* That determination passed, not on the ground that the marriage was valid in *Scotland*, and that therefore it was good—nothing was laid before the Court to shew that the marriage was valid in *Scotland*—but because the Act of Parliament did not put any restraint upon *English* subjects being married in *Scotland*, with respect to the consent of parents. On that ground it is that those marriages are held good, not being contrary to the law of *England*. The same holds as to marriages beyond sea. For *English* subjects going abroad, or to *Scotland*, to marry *English* subjects, have an exemption from that restraint in the act. What was the case before the marriage act? Will any body say, that before the act, a marriage solemnized by persons going over to *Calais*, or happening to be there, was void in this country, because such a marriage might be void by the laws of *France*, as perhaps it was, if solemnized by a Protestant Priest, whom they do not acknowledge, or if in any way clandestine, or without consent; and that therefore it should be set aside by a Court in *England*, upon account of its being void by the law of *France?* No. The laws of the state to which the parties are subject must determine the marriage, unless you can shew that the law of the other country is that, by which its validity is to be decided.

That brings me to the other great consideration in this case, whether the validity of these marriages, being solemnized in *Ypres* and *Denmark*, are to be tried by the laws of those countries. If they are, the

* *Compton* v. *Bearcroft*, Arches 1767, Delegates 1769, *vide infra*, p. 444.

the laws of those countries must be laid before the Court, and proved in the best manner possible; not by the opinions of lawyers, which is the most uncertain way in the world, but by certificates, laying the ordinances of those countries before the Court. Without considering how far that law is capable of being proved in the present case, the previous question arises with respect to jurisdiction, whether the laws of that country in which the marriage is celebrated should operate, merely because it was celebrated there?

I conceive the law to be clear, that it is not the transient residence, by coming one morning and going away the next day, which constitutes a residence, to which the *lex loci* can be applied; so as to give a jurisdiction to the law, and cause it to take cognizance of a marriage celebrated there. It is certain, that domicil, or established residence, (that is, such a kind of residence as makes the party subject to the laws of that country) may have that effect; and, with respect to persons so domiciled, the laws of the country must be adhered to in contracts made there. This was the case of *Scrimshire;* all the proceedings of the Court of *France* were laid before the Court. I remember it, though it was a long time ago; and I was counsel for the lady. The mother of the young man was at *Bologne,* where they had gone *animo morandi.* It was stated in all the proceedings, that they were domiciled in *France;* he went there to reside for purposes of education, and did reside there; and the mother continued to reside there, till she obtained the sentence that was pleaded in the Consistory Court. I do not in the least call in question that determination in the Consistory Court. Every man has allowed the great and extensive knowledge of the

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the Judge; but he founded his judgment upon the sentence given in that Court, which had assumed jurisdiction and had a right to assume it; he paid all respect to the judgment, and upon that he gave his opinion that the party suing should be dismissed.

There was a sentence then in that case given in a competent Court, trying the question in a country where the parties were domiciled and settled. But what is this case? The parties arrive at *Ypres* the 21st, are married and go away on the 22d. And so strong is that circumstance felt, that it is pleaded in the 14th article of the libel, "that neither the said *F. M. Harford*, "nor *Robert Morris*, ever was a subject of the "*French* King, nor of the Empress Queen, or of "the States General of the United Provinces, nor "were resident in the said city of *Ypres*." The counsel have argued that there was no residence, that the residence in both places was fictitious, and merely for the purpose of this marriage. Can that give jurisdiction to the Courts of *Ypres* and *Denmark*, if the residence was such as to be called no residence there, and was only for the sake of this marriage, — if they were transient passengers, *voyageurs*, not going into the country with a view of becoming subjects of that country. And here I must observe, that I do not mean that every domicil is to give a jurisdiction to a foreign country, so that the laws of that country are necessarily to obtain and attach upon a marriage solemnized there; for what would become of our factories abroad, in *Leghorn* or elsewhere, where the marriage is only by the law of *England*, and might be void by the law of that country; nothing will be admitted in this Court to affect such marriages

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so celebrated even where the parties are *domiciled*; but where the parties are not domiciled, and only going, I will not say to evade the laws of this country, as that is an improper expression, but to celebrate a marriage there, by the laws of this country, it shall not be affected by the marriage act, from which persons are expressly exempted that are beyond the sea. Can such a marriage then be called in question in this Court? I cannot say *that*, any more than I can say a *Scotch* marriage shall be called in question, to affect the rights of so many people married under the notion of the marriage act not reaching them, where they mutually contracted themselves. If there is nothing in this case, which shews that Mr. *Morris* can legally be accused of violence or any misbehaviour, such as will affect a marriage, — if there is nothing contrary to the laws of *England*, and if the laws of foreign countries (however clear) do not reach this case, because the parties are not subjects there, I cannot say that it is contrary to the law of *England*. There was no inhabitancy in the provinces of *Flanders*, nor of *Holland*, nor the *United Netherlands*, but on the contrary, they went as subjects to the crown of *Great Britain*, and must be considered as strangers there. The question then must depend chiefly upon this, whether according to the laws of *Great Britain*, by which they are obliged to regulate themselves, they have done the same as in *Great Britain* would be considered as a good and lawful marriage. The very plea states, that it was not against the laws of *Great Britain*. What am I to conclude from thence? If the suit on this marriage had been brought at *Ypres*, or in *Denmark*, the Courts of those countries would not have tried it there. They

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would have said, "we have nothing to do with you, you are not our subjects." And so the *Danish* lawyer has expressed himself in giving his opinion. I am told also by the counsel, that the *Danish* residence was as fictitious as the other; and I take it to be so; as the plea asserts that Mr. *Morris* falsely stated himself to be an inhabitant of *Denmark*, and a freeholder of *Wandsbeck*, where he was said to reside.

This is then a case, which may be determined upon the libel; there is nothing affecting this marriage from the general law, from the *Jus Gentium*, and nothing contrary to the law of *England*. The laws of *Ypres* and *Denmark* do not reach the case; and they ought not to be pleaded upon it.

I do not say that foreign laws cannot be received in this Court, in cases where the Court of that country had a jurisdiction; or that this Court would not determine upon those laws in such a case. But I deny the *lex loci* universally to be a foundation for the jurisdiction, so as to impose an obligation upon the Court to determine by those foreign laws. I think it extremely material that a question of this nature should be determined at once. I hope it will go to the Delegates, that it may quiet every question of this sort. I must declare again, though I respect and shall do every thing in my power to carry into execution, that excellent law, the marriage act, I never will interpose, as a Judge of this Court, judging according to the laws of this country, in cases of marriage, to carry the restraints of that act, further than the law intended they should be carried.

I will only add, that if foreign Courts have jurisdiction, they are open. Why does not the party go to them? Every Court may determine where it has jurisdiction. If they have none, it is absurd

to

to say that the Ecclesiastical Court here should determine, by the laws of that country, which has no jurisdiction. One or the other has jurisdiction. Therefore take which you will,—it is impossible for the laws of another country to be the rule of this Court. I do not say, that foreign law cannot in any case be considered; but the case must be extremely clear, as clear as in that which was before Dr. *Simpson*, in *Scrimshire*'s case. There was evidence of jurisdiction assumed and exercised, and for good reasons. The whole of the proceedings in *France* were transmitted to the Court; and when that is done, the Court will determine upon the operation and force of such sentence so introduced; but what danger would there be to the subject to make questions of this sort determinable by foreign laws? I put it upon the clear proofs which appear upon the libel itself, without taking advantage of the words of the libel, and with reference to the substantial character of the marriage there described, I cannot find any precedents, which can possibly lay a foundation, for adducing the law of that country, where the marriage was actually celebrated in the manner which appears in this case.

Suppose a man goes to *Calais*, marries there, and comes away the next day, I should hold that a good marriage, according to the laws of this country. That is as much a good marriage, and as agreeable to the law, as a marriage in *Scotland*. I shall never think it my duty to enter into the laws of *France* or *Denmark*, to apply them in such a case as this; for all the foreign laws, as the several advocates have said, relate to subjects, and to people to be considered as subjects; and these people are not so to be considered, even upon their own shewing. Upon the arguments which I have

 heard,

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2d Dec. 1776.

heard, therefore, and upon every view which I can form of this case, there appears to be no foundation in law for this libel, — and therefore I reject it.

An appeal was prosecuted to the High Court of Delegates, and a full commission was granted, consisting of three Spiritual Lords, the Archbishop of *York* (*Markham*), the Bishop of *Rochester* (*Thomas*), and the Bishop of *Peterborough*; (*Hinchcliffe*).—Three Temporal Lords, the Earl of *Hillsborough*, Earl of *Galloway*, and Lord *Sandys*. — Three Judges of the Common Law Courts, Mr. Justice *Willes*, Sir *Beaumont Hotham*, Sir *James Eyre*. —Three Civilians, *Peter Calvert*, LL.D. Dean of the Arches, Sir *James Marriott*, Knight, LL.D. Judge of the Admiralty, *William Macham*, LL.D.

Counsel for Miss *Harford*, the King's Advocate, Dr. *Wynne*; the Solicitor General, Mr. *Mansfield*, Mr. *Kenyon*, Dr. *Compton*, and Mr. *Dunning*.—For Mr. *Morris*, Mr. *Bearcroft*, Mr. *Arden*, Dr. *Harris*, Dr. *Bever*, Dr. *Scott*, and Mr. *Erskine*.

On 28th *February* 1781, the Court reversed the sentence of the Court below, and admitted the libel and retained the principal cause; and on the 21st *May* 1784, the cause having been fully argued on the proofs, &c. the Delegates pronounced the said pretended marriage, *howsoever had and solemnized, &c.* null and invalid.

Sir *W. Wynne*.

In *Fust* v. *Bowerman*, Arches, 22d *February* 1790, the Court adverted to the grounds of that judgment, and observed:—" The case of *Harford* v. *Morris*, was that " of the marriage of a girl above the age of legal con- " sent, but taken from school by one of her guardians; it " was argued on the law, as void by the *lex loci*. But the " Judges during the argument desired the Counsel to con- " sider, whether the marriage might not be declared void on " the ground of force and custody. That point was argued " by order of the Court, and it is well known, that the deci- " sion passed ultimately on that principle."

It had been said in argument at the bar, and was not contradicted by the Court, " that Mr. Baron *Eyre* was un- " derstood to have said, that he felt great difficulty on the " other point."

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FALSELY CALLING HERSELF MIDDLETON.

ARCHES.

THIS was a suit of nullity of marriage brought by *Edmund Pytts Middleton* against *Martha Janverin*, calling herself *Middleton*. The marriage was had between the parties at *Furnes*, in *Flanders*.

Marriage of English subjects celebrated abroad, not according to the *lex loci*,—held *invalid.*

The case was argued by Sir *John Nicholl* and Dr. *Laurence* on the part of the husband: and by Dr. *Arnold* and Dr. *Swabey* for the wife.

JUDGMENT.

Sir *W. Wynne.*—This is a suit of nullity of marriage, brought before me by letters of request from the chancellor of *Winchester*, by *Edmund Pytts Middleton*, against *Martha Janverin*, falsely calling herself *Middleton*. The facts pleaded in the libel, and admitted in the personal answers of *Martha Middleton*, are, "that *Edmund Pytts Middleton*, then a minor, between the age of sixteen and "seventeen, (his father being dead, and his mother "married to a second husband), was, in the month "of *December* 1776, sent to the town of *St. Omer*, "in *French Flanders*, for the purpose of education, "and of learning the *French* language; that he "arrived at *St. Omer* on the 25th of *December* of "that year, and there became acquainted with an "*English* woman of the age of twenty-eight years, "who at that time lodged and boarded at a private "house at *St. Omer*. On the 28th of *March* follow-"ing, they set out with two *English* ladies for "*Austrian Flanders*, in order to procure a marriage, "and arrived at *Furnes*, which was then one of the

 "barrier

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" barrier towns under the dominion of the empress
" queen, but, by virtue of the treaty of *Utrecht*, was
" at that time garrisoned by a body of troops in the
" service of their High Mightinesses the States
" General; that they arrived at an inn on *Easter*
" *Sunday*, and that, very soon after their arrival, one
" of the ladies enquired, whether there was not a
" minister who married *English* persons there, and
" was informed, that Mr. *Vanderbrugge*, minister
' of the *Dutch* garrison, had married several
" *English* people there, or to that effect."

She further answers, " that although she was
" present when the said conversation passed, that
" she did not understand the same, because such
" conversation was carried on in the *French* lan-
" guage, which she did not understand; she says,
" that about eleven o'clock in the morning of
" *Easter Sunday*, the 30th of *March* 1777, she,
" with the said *Edmund Pytts Middleton* and two
" *English* ladies, went, with the landlord of the inn
" as a guide, to the house of Mr. *Vanderbrugge*,
" who was, as she believes, a priest or minister in
" holy orders of the Calvinistic or Lutheran
" church; that on her arrival there, Mr. *Vander-*
" *brugge* was informed by one of the *English*
" ladies, that *Edmund Pytts Middleton* and this
" Respondent were desirous of being married by
" him, and that he did celebrate a marriage be-
" tween *Edmund Pytts Middleton* and this Respond-
" ent, in a room in his house, in the presence of
" the two *English* ladies, and a man who officiated
" as clerk on the occasion; and she believes that
" such marriage was solemnized in the *Dutch*
" language, and that *Edmund Pytts Middleton*,
" the two *English* ladies, and herself, were then all
" ignorant

" ignorant of that language; that the marriage
" was solemnized without any publication of
" banns, licence, or dispensation previously ob-
" tained, and that it was had without the know-
" ledge of his mother or her husband, but whether
" he had any guardian she does not know. She
" says, that after the solemnization of the marriage,
" they quitted *Furnes*, and proceeded together to
" *Nieuport*, where they staid all night; and on the
" day following went to *Bruges*, and from thence
" to *Lisle*, and returned to *St. Omer* about a week
" after they had quitted it. She says, that during
" the journey from *Furnes* to *St. Omer*, it was pro-
" posed by this Respondent to *Edmund Pytts*
" *Middleton*, that, on their return to *St. Omer*, no
" notice whatever should be taken by either of
" them of the aforesaid marriage so had and
" solemnized between them, and accordingly they
" did not take any notice of such marriage; that
" they never lived or cohabited together, nor
" owned and acknowledged each other as man and
" wife at *St. Omer*, but that each of them lived, as
" before, apart, in their respective boarding-houses."
She further says, " that she did not return to
" *England*, but remained at *St. Omer* until about
" the 31st of *May* 1777, when she left that place,
" and arrived in *England* on the 3d of *June* follow-
" ing; and she believes, that *Edmund Pytts Mid-*
" *dleton* remained at *St. Omer* until about the
" month of *October* 1777, when he also returned to
" *England*; — that after that he frequently visited
" the Respondent, and at such times often earnestly
" requested her to keep the marriage a secret,
" alleging that he had reason to believe that *Ed-*
" *mund Pytts*, who was his uncle and godfather,

 "and

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" and intended to give him a considerable fortune, " would be much displeased and offended at him, " in case he should hear that he was married to this " Respondent, and therefore she continued to keep " the marriage a secret from the said *Edmund* " *Pytts*; and this Respondent believes, that about " the beginning of 1780, the said *Edmund Pytts* " *Middleton* went to the *East Indies*, and has ever " since resided there, and that she has always re- " mained in *England*, and considered herself and " claimed to be the lawful wife of *Edmund Pytts* " *Middleton*; and that since he has been in the " *East Indies* she has written and sent several let- " ters to him there, expostulating with him on his " cruel and neglectful behaviour towards her, and " entreating him to remit her some reasonable " maintenance as his lawful wife, but this Re- " spondent never received any answers to either of " the said letters."

Mrs. *Catharine Hansard*, the mother of Mr. *Edmund Pytts Middleton*, says, "that about *October* " 1777 her son returned from *France* to *England*, " and continued from that time until the beginning " of 1780 constantly resident with her and her hus- " band; and during that time, the defendant, " *Martha Janverin*, never lived or cohabited with " her son as husband and wife." Mr. *Hansard* deposes to the same effect.

The libel, after stating the facts of the case, pleads, " that the town of *Furnes* was one of the " barrier towns of their High Mightinesses the " States General, and that there was a church or " chapel there for the use of the garrison; and " further states, that by the laws and ordinances of " the States General in 1580, and by the resolutions

"dated *March* 13th, 1656, relative to the edict
"published by the Emperor *Charles* 5th in 1540,
"all of which are now in full force, it is declared,
"'that marriages can in no way stand valid, with-
"out the previous knowledge of the free state of the
"contracting parties, and without the consent of
"the fathers, mothers, parents or guardians of the
"parties, and that, after publication of banns on
"three several *Sundays* in the place of the parties
"domicil, or legal dispensation of such publication
"being otherwise procured;' and that by the de-
"cree of the Council of *Trent* made in 1563, which
"is received and obeyed as law in all the *Aus-*
"*trian* Low Countries, 'All marriages which are
"not solemnized by the *Proprius Parochus*, or
"Priest of the place, where the parties, or one
"of them, have their residence, or by some other
"Priest, with the licence of their own Priest, or of
"their Ordinary, are declared to be null and void;'
"and that by the laws of their High Mightinesses,
"as well as of the *Austrian* Low Countries, the
"said pretended marriage of *Edmund Pytts Mid-*
"*dleton* and *Martha Janverin* was and is null and
"void."

In proof that this is the law of the United Provinces, to which this garrison in *March* 1777 was subject, they have examined four gentlemen, who are advocates, practising in the Court of Judicature at the *Hague*, and have been so for twenty years; and they have also examined four gentlemen practising in the Courts in *Austrian Flanders*, both with respect to the law and the governing powers, under the circumstances pleaded in the libel; and they conclude, "that by the laws of the United "Provinces of the Low Countries, and the ordi-

"nances

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" nances of the states of *Holland* in 1580 and 1656, " there is no doubt but that the marriage is null " and void on three grounds; first, on account " of the incompetency of the minister who cele- " brated the same; secondly, on the minority of " *Edmund Pytts Middleton*; thirdly, from the want " of publication of banns."

It has, however, been said, that evidence of opinion that such is the law, is not that evidence of the law which the Court ought to require, but that it ought to have had an authentic exemplification of the laws and ordinances of those countries. Now, I think, to obtain that at this time of day would not be a very easy thing; the decrees of the Council of *Trent* are in print, and in every body's hands; and the particular parts of the laws, which are referred to by the advocates, are copied into their opinions, therefore, I think, there is every authentication, and every ground the Court can have, to believe that such ordinances and such laws as they mention, were actually by proper authority published, and were, at the time in question, valid and in force. To be sure, the best evidence would be a sentence of a Court of Judicature of those countries. In the case of * *Scrimshire* v. *Scrimshire* that was obtained; but in this case that would be impossible, because neither of the parties resided in the place where the marriage was performed, even for a day, but came away directly; — more particularly, considering how long it is since the transaction passed, and the revolution which has taken place there, it would have been impossible to have obtained any sentence of a court of judicature on the subject.

* Vide supra, p. 395.

It

It, however, seems to me, that the opinion given in this case by eight gentlemen well acquainted with the laws of those countries, (and they have stated themselves, upon their oaths, to have been in official situations which they describe), is the best evidence, that can be given, of what was the law of those countries at the time of the transaction; and I am convinced by it, that by the decrees of the council of *Trent*, and the laws of *Holland*, to which this garrison was subject, the marriage in question is absolutely null and void, as is declared by those persons.

It is however contended, that admitting the law to invalidate the marriage in those countries, yet that is not the law by which this case is to be decided in this Court. It is not the *lex loci* where the marriage ceremony is performed, which is to determine the question, but you must find out some other law, and that is declared by the counsel for Mrs. *Janverin* to be the law of *England*. Now, in respect to the *lex loci* having been adopted as a rule, I think the case of *Compton* v. *Bearcroft* proves it very strongly. In that case the * Court of Delegates affirmed the rejection of the libel which was given in against the marriage, on different grounds, as I have understood, from those which were taken in the Court of Arches, and because the marriage was a good marriage in *Scotland*, and if all facts pleaded in the libel were proved, the marriage could not be pronounced void under the marriage act; in which it is expressly declared that it shall not extend to *Scotland*. On those grounds it was, as I have understood, that the Delegates rejected the libel; the case of that marriage was therefore determined

* Vide infra, p. 444.

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by the *lex loci.* Those persons having gone to *Scotland,* and been married in a way not good in *England* but good in *Scotland,* and not affected by the marriage act, were considered to have contracted a valid marriage. *

But the case of *Scrimshire* v. *Scrimshire,* which was determined in 1752, was a direct and positive sentence upon the merits of the case, which cannot

* There is a difference in the account of that judgment as explained *here,* and supra p. 430.

The form of pronouncing judgment in the Court of Delegates, without any declaration of the grounds of the sentence, may have given rise to a different construction of the opinions of the judges on this point. The libel, which is here introduced, will shew the ground on which the nullity was originally alleged, on the principle of holding *English* subjects, going to *Scotland* to evade the provisions of the Marriage Act, to the consequences of that act. That appears to have been the gist of the libel and of the arguments, so far as they have been traced in a very imperfect note. When that point was overruled, and the libel deemed inadmissible on that ground (*a*), in which the Court of Delegates concurred with the judgment of the Court below, it might not be material to declare whether the law of *England,* as explained by Sir *G. Hay,* or the law of *Scotland* as here stated, was supposed to be operative. In this manner the difference of construction may have arisen. The libel pleaded,—" The marriage act, " and the minority of the lady, and want of consent, and that " on 13th *March* 1762, a marriage was had and performed in " the dwelling-house of *Thomas Huddlestein,* a cook and con-" fectioner at *Dumfries,* in *North Britain,* by *Richard Jameson,* " the minister, or pretending himself to be the minister of the " *English* chapel at *Dumfries,* who then lodged in the house of " *Thomas Huddlestein,* in whose lodging-room the marriage " was so performed between *Edward Bearcroft,* of *Droitwich,* " in *Worcestershire,* and *Maria Catharine Compton* of *Hartpury,* " in *Gloucestershire,* without publication of banns, and with-" out any licence being had and obtained for the solemniza-" tion of the said marriage, from any person having autho-" rity to grant the same, and that neither *E. Bearcroft* nor " *M. C. Comp-*

(*a*) Arches, 16th *Feb.* 1767. Libel rejected by Sir *George Hay,* sentence affirmed by Court of Delegates, 4th *Feb.* 1769. — Judges Delegate, *Gould,* J. *Perrott* Baron, *Aston,* J. Drs. *Ducarel* and *Clarke.*

not be distinguished from the present, except by the different residence of the parties. Mr. *Scrimshire* was a bachelor, of the age of eighteen, and *Sarah Jones* of the age of fifteen; and being at *Boulogne* in *France*, they were joined together in holy matrimony, according to the rites and ceremonies of the Church of *England*. That cause began as a suit for restitution of conjugal rights. An allegation was given in reply, "that his mother "had been in *France* for some time; that he, about "thirteen or fourteen days before, went over to "visit his mother; and there met with two *Irish* "officers, by whose interference this marriage was "procured. That in order to obtain a sentence "against the marriage, a suit of nullity had been "promoted by his mother at *Boulogne*; it went "on for a short time there, but the Court re-"fused to call in what is called the act of mar-"riage. That in the year 1749, an appeal was

"*M. C. Compton* ever was resident in any part of *North Britain*. "But she the said *M. C. Compton*, in the beginning of *March* "1761, went from the house of *John Dalby*, her testamentary "guardian in *Berks*, to pay a visit to her brother, Sir *William* "*Compton*, at *Henslip*, in the county of *Worcester*, and he "dying, she left that place and went to her mother at *Hart-"pury*, in the county of *Gloucester*, and from thence went, un-"known to *John Dalby*, and without his consent, and without "the knowledge of her other testamentary guardians, with "*E. Bearcroft*, on or about the 6th *March* 1762, to *Dumfries*, "to be married; and that they were married there as aforesaid "merely to evade the laws of this realm, and returned into "*England* on the same day, and proceeded to the house of *E.* "*Bearcroft*, at *Droitwich*, and were never in *North Britain*, but "during the time of the journey, and for the purpose of the "marriage." The certificate of marriage was also pleaded in these words: "I certify, that I married, after the manner of "the Church of *England*, *Edward Bearcroft*, and *Maria Catha-"rine Compton*. (Signed) *J. Jameson*, Minister of the *English* "Chapel at *Dumfries*." The prayer of the libel was, "that the "marriage might be declared null and void, pursuant to the "said act for clandestine marriages".

"carried

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"carried to the Parliament of *Paris*. That "there two sentences were obtained: one in "a criminal form, by which the minister and "the officers were condemned for nine years to "the galleys; and another pronounced the mar-"riage to be null and void." In the suit here, the validity of the marriage was thus brought in question, and the Court pronounced against it, and dismissed Mr. *Scrimshire*. It cannot be denied that this was a sentence which proceeded entirely upon the laws of *France*. If the marriage had passed in this country, in the year 1752, celebrated by a Priest of the church of *Rome*, according to the ceremonies of the church of *England*, it would then have been a good and valid marriage by the law of *England*; but the law of *France* being different, it was set aside. It is said, that was a single case, resting only on the opinion of one Judge, and that there was no appeal. But I also remember to have heard, that the judgment was founded on great deliberation, and that Lord Chancellor *Hardwicke* was consulted on it. In the case of *Butler* v. *Freeman* * Lord *Hardwicke* is reported to have said, "that if the mar-"riage is not good by the law of the country "where it is celebrated, it is not good at all," and the Reporter adds, that it had been lately so determined in the Court of Delegates; but, I apprehend, that was a mistake in the Reporter, mentioning the Court of Delegates for the Consistory Court.

Upon this ground I think the true principle to be, that if the marriage is had abroad, and is not good there, as being contrary to the laws of the country in which it is had, it is not to be held

* *Ambler*, 313.; see also a similar *dictum* of Lord *Hardwicke* long before, A.D. 1744, 1 *Atkyns*, p. 50.

good

good by the law of this country. It is said that there is a difference between this case and that of *Scrimshire* v. *Scrimshire*, that there was in that case a residence of one of the parties fully established; whereas these parties were only three days in the country where the marriage was performed; that in that case they were *English* subjects, with a considerable property in *England*, where they were to return for the enjoyment of all privileges and rights under the marriage so celebrated. But the residence of the young man had not been of fixed continuance, but was for a few days only, though his mother and family had been resident at *Boulogne* about two years before the transaction. The young lady had been there only eighteen months, and for education; therefore I do not see, that this circumstance of residence makes any substantial difference from the present case.

It is however contended that it does; — and that these parties having been but a few hours in the place, that will not give the law of the place a power over them; and therefore the *lex loci* either of *Flanders* or of *Holland* will not have any effect upon the present case. Then what will? Can it be said, that it will require some new rule to affect it? If this marriage is not to be judged by the laws of *Flanders* or of *Holland*, then by what law is it to be judged? The counsel say, "it must be judged "by the law of *England*." What was the law of *England*, in 1777? that if a marriage is had without the consent of parents or guardians, or publication of banns, (either party being a minor) it is null and void by the marriage act. I know no other law of *England* on the subject since 1753. But it is said, that act cannot take effect in this case, because there

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there is an express exception that it shall not extend to *Scotland*, or any marriage had abroad. The reason of the exception as to marriages had abroad is perfectly clear. The act could not extend to them; for if it were held that an *Englishman* abroad cannot marry without the solemnities required by the act, he could not marry there at all, for it is impossible to have those solemnities observed in a foreign country. But the exception with respect to *Scotland* was of another kind: I am old enough to remember the passing of that act; and I recollect well that there was an intention at the time, of introducing another act of Parliament, which was to extend to *Scotland;* but by the Act of Union, the state of religion is not to be touched, it is to remain exactly as it was, and therefore there was a difficulty arising out of the Act of Union in applying the marriage act to that country.

The only law of *England* as to marriage is the marriage act: it cannot by that law be said that a marriage is good which is not had according to it. It is true that a marriage had abroad is not within that act. But it does not follow from thence that it is good by the law of *England.* For, as I have before said, I know of no other law of *England* but *that.* And the question will be, wheher it be good by the law of the country in which it was celebrated. I am clearly of opinion that this marriage, which was had at *Furnes*, in the manner I have stated, does not amount to a valid and legal marriage. It is not so by the law of the country in which it was celebrated; it is not so by the law of this country, and therefore I pronounce it to be null and void.

APPENDIX.

The DEPOSITIONS of WITNESSES, and other EVIDENCE, in the CAUSE of DALRYMPLE *v.* DALRYMPLE, *suprá* p. 58.

28th March 1809.

DAME CHARLOTTE JOHNSTONE, Wife of Sir John Lowther Johnstone, of Portman Square, in the County of Middlesex, Baronet, aged twenty-six years, a Witness, produced and sworn.

DAME CHARLOTTE JOHNSTONE.

1. TO the first article of the said Libel the Deponent saith, that she is the sister of Johanna Dalrymple, formerly Gordon, Party in this Cause, and that in or about the month of March, in the year 1804, whilst the Deponent and her said sister were living with their father Charles Gordon, Esq. at his house in St. Andrew's Square, in the City of Edinburgh, in Scotland, an acquaintance commenced between the articulate John William Henry Dalrymple, Esq. Party in this Cause, (who was then a Lieutenant in his Majesty's Fifth Regiment of Dragoon Guards, stationed at Piershill Barracks, near the said City of Edinburgh, in Scotland,) and the Deponent's said sister, by the said John William Henry Dalrymple visiting at the house of their said father, Charles Gordon, Esq. and when such their acquaintance commenced, the said Johanna Dalrymple, then Gordon, was a Spinster, upwards of twenty-one years of age, and, as the Deponent believes, was free from all matrimonial contracts and engagements; and he, the said John William Henry Dalrymple, was a Bachelor, aged about nineteen years, and for aught the

Deponent

DAME CHARLOTTE JOHNSTONE.

Deponent knows to the contrary, he was also free from all matrimonial contracts and engagements; and a short time after the acquaintance of the said parties commenced, they became extremely familiar and intimate, and there appeared to be a great flirtation between them, insomuch that the Deponent had no doubt but that the said John William Henry Dalrymple had made his addresses to the said Johanna Dalrymple, then Gordon, in the way of marriage, but the Deponent was kept in ignorance, by her said sister, of her having accepted such the courtship and addresses of the said John William Henry Dalrymple for some time, and when the Deponent used to ask her said sister as to her intentions in respect to her becoming the wife of the said John William Henry Dalrymple, she used to laugh it off, and never give the Deponent a direct answer thereto. And the Deponent further saith, that though, in the month of May, in the said year 1804, she did not doubt from the flirtation that was kept up between the said John William Henry Dalrymple and the said Johanna Dalrymple, then Gordon, (and which she saith was carried on secretly and unknown to their respective fathers,) that they had a Tie upon each other from some promise entered into by them, so that neither of the parties could marry any other person without each other's permission; yet the Deponent had no knowledge of the said Parties in this Cause having respectively signed and exchanged a written Promise of Marriage with each other at that time. And she further saith, that in the last week of the said month of May 1804, she went from her said father's house in St. Andrew's Square, Edinburgh, where she left her sister Johanna Dalrymple, then Gordon, and the rest of the family, to go on a visit at North Berwick, and did not return therefrom till about the middle of the month of June following, when she found the said family, and, amongst them, her said sister Johanna Dalrymple, Party in this Cause, at her said father's country seat at Braid, about three miles from Edinburgh; and the Deponent therefore knew nothing of what passed between the said John William Henry Dalrymple and Johanna Dalrymple, formerly Gordon, his wife, during the time she, the Deponent, was so as aforesaid absent on such visit, for the said Johanna Dalrymple did not make the Deponent her confidante. And the Deponent also further saith, that she and her said sister Johanna Dalrymple, formerly Gordon, used to sleep together in their said father's house; and that in the house at Braid aforesaid there was a dressing-room which was solely used by the

said

DAME CHARLOTTE JOHNSTONE.

said Johanna Dalrymple, formerly Gordon, (the way to which was through their said bed-room,) and there was another dressing-room which was always used by the Deponent; and in the latter end of the month of June, and beginning of the month of July, in the said year 1804, the Deponent, from having heard it reported that the said John William Henry Dalrymple had been known to go late at night to the Deponent's said father's house at Braid, and had been seen coming therefrom early in a morning, was, on talking to her said sister Johanna Dalrymple, formerly Gordon, on that subject, led to suspect that, from what her said sister said at the time, that she had sometimes concealed the said John William Henry Dalrymple in her said dressing-room, but the Deponent never saw or heard him either go into, or come out of, the said dressing-room, and never heard any noise therein which led her to suppose he was there, and never actually knew of his being therein; neither did she ever miss the said Johanna Dalrymple, formerly Gordon, from her bed during the time she was in the habit of sleeping with the Deponent; and although the Deponent did, nevertheless, suspect that the said John William Henry Dalrymple had at some time, or times, (though she knew not when,) been in her said sister's dressing-room, yet the Deponent never did imagine that they had consummated a marriage between them in the said house, or at any other place, nor did the Deponent know or consider that they the said John William Henry Dalrymple and Johanna Dalrymple, formerly Gordon, had exchanged acknowledgements in writing of their being lawful husband and wife, or had contracted or bound themselves to each other according to the laws, usages, and customs of the kingdom of Scotland in respect to marriages, for the Deponent never, till after the proceedings in this Cause had commenced, knew or heard that they the said Parties in this Cause had exchanged written acknowledgements of their being lawful husband and wife, and had consummated their marriage, but, on the contrary, always, till very lately, conceived that they the said Parties in this Cause had merely entered into a written promise with each other so as to have a Tie upon each other that neither of them should marry another person without the consent of the other of them: and although the Deponent did very frequently (after she understood the said Parties had entered into such written promise with each other) in her letters to her said sister address her as Mrs. Dalrymple, and did also prior thereto call the said John William Henry Dalrymple

 "Brother

DAME CHARLOTTE JOHNSTONE.

"Brother Dal.;" yet she saith she only did so jocularly, and not from a belief at that time of their being husband and wife; and even so late only as last January was a twelvemonth, when the Deponent was in Scotland, and her sister, the said Johanna Dalrymple, was on a visit to her at Balincreiff, near Edinburgh, the Deponent, in conversation with her said sister, took occasion to ask her when she meant to become Mrs. Dalrymple? to which she answered, "You shall never see me Mrs. Dalrymple;" or to that effect. And the Deponent lastly saith, that the aforesaid acknowledgement, or contract of marriage, so entered into and exchanged between them the said Parties in this Cause, was kept a secret by them, and they never appeared familiar with each other but when they were not in company, for when they were in company at the Deponent's said father's house, the same distance was observed by the said John William Henry Dalrymple towards the said Johanna Dalrymple, formerly Gordon, as towards the Deponent, or any other person; and they were not, to the Deponent's knowledge, generally known as to be or considered lawful husband and wife, nor does she ever recollect to have heard the said Johanna Dalrymple, formerly Gordon, at any time call him, the said John William Henry Dalrymple, her husband, or acknowledge him as such; but she thinks, and is pretty certain, she hath heard him call her said sister his wife frequently; and further to the said article she cannot depose.

2. To the second Article of the said Libel, and to the Paper-writings marked No. 1 and No. 2, therein particularly pleaded and referred to, the Deponent saith, that she of course was accustomed to see her said sister Johanna Dalrymple very frequently write and subscribe her name in the course of the number of years they lived together, and thereby the Deponent became well acquainted with her said sister's manner and character of hand-writing and subscription, but she does not remember ever to have seen the said John William Henry Dalrymple write, though she saith she acquired a good knowledge of his manner and character of hand-writing from having often, during the said year 1804, received notes from him, and seen letters which she hath known to have come from him. And the Deponent having now carefully viewed the said two Exhibits, marked No. 1 and No. 2, pleaded and referred to in the said second Article, and now produced and shewn to her, she saith that she verily believes the words "and I promise the same," written in the said Exhibit,

marked

marked No. 1, and the superscription "J. Gordon," thereto set and subscribed, were and are of the proper hand-writing and subscription of her said sister Johanna Dalrymple, then Johanna Gordon, spinster, and from the knowledge she had as aforesaid acquired of the hand-writing and subscription of the said John William Henry Dalrymple, Party in this Cause, she is of opinion, and believes, that the rest of the said Paper-writing, marked No. 1, and the name "J. Dalrymple," thereto set and subscribed, are of the proper hand-writing and subscription of the said John William Henry Dalrymple, Party in this Cause, from the great similarity she observes in such writing and signature to his the said John William Henry Dalrymple's hand-writing; but she cannot take upon herself to say of whose hand-writing the endorsement, "a sacred promise" is. And the Deponent having carefully viewed and perused the said Paper-writing, marked No. 2, she saith that she is not quite so certain whether the name "J. Gordon," thereto set and subscribed, is of the hand-writing of the said Johanna Dalrymple, formerly Gordon, or whether any part of the said Paper-writing is of her said sister's hand-writing, though the said signature bears some resemblance to her manner and character of subscription; neither can she, with any degree of certainty say, whether any part of the said Exhibit, marked No. 2. is of the hand-writing of the said John William Henry Dalrymple, Party in this Cause, though she thinks that the two first lines thereof, and the date and subscription thereto, "May 28th, 1804," "J. Dalrymple," bear a very strong resemblance to his manner and character of hand-writing and subscription; but she hath not the least doubt, and does verily believe, that J. Dalrymple and J. Gordon, who appear to be Parties to the said two Exhibits, marked No. 1. and No. 2, and John William Henry Dalrymple, and Johanna Dalrymple, his wife, formerly Johanna Gordon, spinster, the sister of the Deponent, and the Parties in this Cause, were and are the same persons, and not divers: and further to the said article she cannot depose.

DAME CHARLOTTE JOHNSTONE.

3. To the third article of the said Libel the Deponent saith, that the marriage pleaded in the first article of the said Libel on which she is examined, to have been entered into between the said John William Henry Dalrymple and Johanna Dalrymple, formerly Gordon, Parties in this Cause, was so entered into as she is certain, and also (if consummated) was so consummated without the knowledge or privity of their respective parents, for it was kept wholly a secret from both families that such a mar-

DAME CHARLOTTE JOHNSTONE.

riage had been entered into, and further to said article she cannot depose, save that the said Johanna Dalrymple, formerly Gordon, continued and resided at the house of Charles Gordon, Esq. her father, and passed under her maiden name of Gordon, till the proceedings in this Cause were commenced: and further she cannot depose.

4. To the fourth article of the said Libel the Deponent saith, that she well remembers the said John William Henry Dalrymple went to join his regiment at Dunbar, in Scotland, soon after or about the time the marriage in question in this Cause is pleaded to have been entered into between the parties therein, after which time the Deponent had reason to suspect that a correspondence was kept up between them, the said parties in this Cause; but her said sister being very secret with the Deponent in respect thereto, she cannot further depose to the said article.

5. To the fifth article of the said Libel, and to the several Exhibits therein pleaded and referred to, the Deponent knows not to depose.

6. To the sixth article of the said Libel the Deponent saith, she knows not to depose, save that one day happening as she believes, sometime about the time pleaded, (though she can by no means remember the time or place when or where the circumstance now about to be deposed of by her took place) she, the Deponent, being with her sister the said Johanna Dalrymple, formerly Gordon, alone (whom the Deponent did not then consider as married) a paper-writing was produced by her said sister, who read the same, to the Deponent, by which the Deponent understood that the said John William Henry Dalrymple, and the Deponent's said sister, had entered into such an engagement that they had a Tie upon each other, so that neither of them could marry any other person without the consent of the other of them: but the Deponent did not consider from what she heard read as aforesaid, that it was an acknowledgement or declaration of a marriage between them the said Parties in this Cause: and she further saith, that at the time now deposed of, her said sister, Johanna Dalrymple, Party in this Cause, told the Deponent that she wished her to be a witness to what Mr. Dalrymple had written (meaning the paper-writing which she had just then read to the Deponent) and asked the Deponent if she had any objection to sign such paper as a witness; to which the Deponent replied that she had not the least objection to do so, if it could

DAME CHARLOTTE JOHNSTONE.

could be of any service to her and her said sister, saying, she wished the Deponent to sign it to keep him (meaning the said John William Henry Dalrymple, Party in this Cause) to his word; the Deponent thereupon replied, that if he required that to keep him to his word he was not worth having: but the said Johanna Dalrymple continuing to urge the Deponent to sign such paper-writing as a witness, and saying it would be doing her a favour to sign the same as a witness, she, the Deponent, accordingly did so, although she did not see the same written or signed together by either of the parties therein mentioned: and further she cannot depose.

7. To the seventh article of the said Libel and to the Paper-writings or Exhibits, marked No. 10, and No. 11, to the said Libel annexed, and in the said seventh article particularly pleaded and referred to, the same having been now produced and shewn to and carefully viewed and perused by the Deponent, she saith that the name and word "Witness, Charlotte Gordon," appearing subscribed and written at the bottom of the said Exhibit, marked No. 10, is of her, the Deponent's, own proper hand-writing and subscription, and she knows the same thereby to be the very same Paper-writing by her deposed of in her deposition to the sixth article of the said Libel, which Paper-writing, except what the Deponent so as aforesaid wrote thereon, she supposes and believes is all of the proper hand-writing of the said John William Henry Dalrymple, Party in this Cause; but she cannot take upon herself to say of whose hand-writing the said Exhibit No. 11. is. And she lastly saith, that she hath not a doubt, but does verily believe, that John William Henry Dalrymple and Johanna Gordon, who appear to have been Parties to the said Exhibit, marked No. 10.; and John William Henry Dalrymple, and Johanna Dalrymple, formerly Gordon, his wife, the Parties in this Cause were and are the same persons, and not divers: and further she cannot depose.

8. To the eighth article of the said Libel the Deponent saith, that she remembers the said John William Henry Dalrymple left Scotland with his father,* General William Dalrymple, in the month of July, in the said year 1804, or thereabouts, and came to England, and continued to live and reside there till about the month of July 1805, when he went to Malta; and the Deponent having, in the month of January, in the said year 1805, married her present husband, came also to live in England, and in the course of the time between her so coming to live in England

 and

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and the said month of July, when the said John William Henry Dalrymple went to Malta, she saw him once or twice in her own house, but she hath no knowledge of his having written the letters mentioned and alluded to in the said article to her the Deponent's said sister, Johanna Dalrymple, formerly Gordon: and further to the said article she cannot depose.

9. To the ninth article of the said Libel, and to the several Exhibits therein pleaded and referred to, the Deponent cannot depose.

10. To the tenth article of the said Libel, and to the Paper-writings or Exhibits, marked No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 12, No. 13, No. 14, and No. 15, which are particularly pleaded and exhibited in the 4th, 5th, 8th, and 9th articles of the Libel, on which she is now examined, which said Exhibits purport to be notes and letters, and have now been produced and shewn to and carefully viewed and perused by the Deponent. She saith she is of opinion, and believes that the initial letters "J. D." to the said Exhibits, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, and No. 9, the initial letter "D." to the said Exhibit No. 12, and the initials "J. D." to the said Exhibits, No. 13, and No. 14 and 15, and the superscriptions thereon, were and are respectively of the proper hand-writing and subscription of the said John William Henry Dalrymple, Party in this Cause. And that by the words "My dearest sweet wife," "My dearest sweet love," "My beloved wife," and such like, as well as various other expressions contained in the said letters, was meant and intended the said Johanna Dalrymple his wife, the Party in this Cause, and that John William Henry Dalrymple, who wrote, subscribed, superscribed, and sent the said letters, and Johanna Dalrymple, to whom the same were addressed, under her maiden name of Gordon, and John William Henry Dalrymple, and Johanna Dalrymple his Wife, the Parties in this Cause, were and are the same persons, and not divers: and further she cannot depose.

CHARLOTTE JOHNSTONE.

30th March 1809.

Repeated and acknowledged before
Dr. Ogilvie, Surrogate.

Pres. Mark Morley,
Notary Public.

On the LIBEL and EXHIBITS given on behalf of MRS. DALRYMPLE.

22d April 1809.

SAMUEL HAWKINS, of Findon, in the County of Sussex, Esq. aged forty-nine years and upwards, a Witness, produced and sworn.

SAMUEL HAWKINS, ESQ.

2. TO the second article of the said Libel, and to the Paper writings or Exhibits marked No. 1. and No. 2. therein pleaded and referred to, and now produced and shewn to the Deponent, he saith, that he hath been well acquainted with the articulate John William Henry Dalrymple, Party in this Cause, from the month of August or September 1806, to the present time, and hath during that time frequently seen him write and subscribe his name: and hath also received many letters from him, whereby the Deponent hath become well acquainted with his manner and character of hand-writing and subscription. And having now carefully viewed and perused the Paper-writing or Exhibit marked No. 1. and the endorsement thereon of the words "A Sacred Promise," he saith, that he can and does, without the least doubt or hesitation, depose, that he verily and in his conscience believes the words "I do hereby promise to marry you as soon as it is in my power, and never marry another;" and also the name "J. Dalrymple," written and subscribed in the said Exhibit, marked No. 1. were and are all of the proper hand-writing and subscription of the aforesaid John William Henry Dalrymple, Party in this Cause. And he further saith, that soon after the commencement of his acquaintance with the said John William Henry Dalrymple, he the Deponent had occasion to correspond with the articulate Johanna Dalrymple, formerly Gordon, also Party in this Cause; and in consequence thereof the Deponent received a great many letters from her, written and dated from Scotland, between the latter end of the said year 1806, and the end of January last past; the last letter he received from her, being dated the 28th of January 1809, in all of which letters she subscribed herself "J. Gordon," to the best of the Deponent's recollection, excepting in her said letter, in which she subscribed herself "J. Dalrymple," and the Deponent invariably addressed her as Miss Gordon, excepting his reply to her said last letter, which he addressed to her as "Mrs. Dalrymple," and by his so receiving

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receiving many letters from the said Johanna Dalrymple, formerly Gordon, he thereby became well acquainted with her manner and character of hand-writing and subscription, though he never saw her write. And the Deponent having now again carefully and attentively viewed and perused the said Paper-writing or Exhibit, marked No. 1. and having compared some of the said letters, which he as aforesaid received from the said Johanna Dalrymple, formerly Gordon, with the words "and I promise the same," and also with the name "J. Gordon," written in and subscribed to the said Exhibit No. 1. he saith, that he hath not the least doubt, but does verily believe that the said recited words and signature, were and are of the proper hand-writing and subscription of the same person, who so as aforesaid corresponded with the Deponent, and subscribed herself "J. Gordon," and afterwards "J. Dalrymple," and whom he also believes to be the identical Johanna Dalrymple, formerly Gordon, the Party promoting this Cause; but he cannot take upon himself to depose of whose hand-writing the said endorsement "A Sacred Promise" is. And the Deponent having now carefully viewed and perused the said Paper-writing, marked No. 2. he saith, that he does also, without the least doubt or hesitation depose, that the words "I hereby declare, that Johanna Gordon is my lawful Wife, May 28th, 1804," and the name "J. Dalrymple," thereto set and subscribed; and also the three words "and I hereby" commencing the next sentence in the said exhibit, were, and are, as he verily and in his conscience believes, of the proper hand-writing and subscription of the aforesaid John William Henry Dalrymple, Party in this Cause, and that the remaining part of the said sentence, contained in the following words, "Acknowledge John Dalrymple as my lawful Husband," and the name "J. Gordon," set and subscribed thereto, were and are of the proper hand-writing and subscription of the same person, who as aforesaid corresponded with the Deponent, and subscribed herself "J. Gordon," and afterwards "J. Dalrymple," and whom he believes to be the articulate Johanna Dalrymple, formerly Gordon, the Party promoting this Cause; and he does therefore verily believe, that J. Dalrymple and J. Gordon, who were Parties to, and wrote and signed the said two Exhibits, marked No. 1. and No. 2. and John William Henry Dalrymple, and Johanna Dalrymple, formerly Gordon, Parties in this Cause, were and are the same Persons and not divers. And further he cannot depose to the said Article.

7. To

SAMUEL HAWKINS, ESQ.

7. To the seventh article of the said Libel, and to the Paper-writings or Exhibits, marked No. 10. and No. 11. therein pleaded and referred to, and now produced and shewn to the Deponent, he saith, that having attentively viewed and perused the said Exhibit, marked No. 10, he hath not the least doubt, but does verily believe, that the whole body, series, and contents of the said exhibit, and also the name "J. W. H. Dalrymple," thereto set and subscribed, were and are all of the proper hand-writing and subscription of the aforesaid John William Henry Dalrymple, Party in this Cause, excepting the names and words "J. Gordon," now "J. Dalrymple," appearing subscribed at the end of the said exhibit, and also excepting the name and word "Witness Charlotte Gordon," written at the foot or bottom of the said exhibit, which said names and word "J. Gordon," now "J. Dalrymple," he verily believes to be, and he hath no doubt were and are of the proper hand-writing and subscription of the aforesaid Johanna Dalrymple, Party in this Cause, formerly Gordon, who corresponded with the Deponent, in the manner herein-before set forth. And the Deponent having also attentively viewed the initials "J. D." and "J. G." subscribed to the Exhibit or Envelope, marked No. 11, he saith, he doth verily and in his conscience believe the said initial letters "J. D." to be of the proper hand-writing and subscription of the aforesaid John William Henry Dalrymple, Party in this Cause; and that the said initial letters "J. G." are of the proper hand-writing and subscription of the aforesaid Johanna Dalrymple, formerly Gordon, Party in this Cause, who corresponded with the Deponent, in the manner herein-before set forth, under the name of "J. Gordon," and afterwards of "J. Dalrymple," and the Deponent hath not the least doubt, but does verily believe that John William Henry Dalrymple, and Johanna Dalrymple, formerly Gordon, who were Parties to the said Exhibits, marked No. 10, and subscribed the same, and set their initials to the said Exhibit or Envelope, marked No. 11, and John William Henry Dalrymple, and Johanna Dalrymple, formerly Gordon, Parties in this Cause, were and are the same persons, and not divers. And further to the said Article he cannot depose.

10th. To the tenth article of the said Libel the Deponent saith, that having now attentively viewed and perused the several Exhibits annexed to the said Libel, marked No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 12, No. 13. No. 14, and No. 15, particularly pleaded and referred to in the said article, the same having

SAMUEL HAWKINS, ESQ.

having been now produced and shewn to the Deponent, he saith, that he hath not the least doubt, but does verily and in his conscience believe, that the whole body, series, and contents of the said several Exhibits, and the initial letters "J. D." to the said Exhibits, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, and No. 9, the initial letter "D." to the said Exhibit No. 12, the initial letters "J. D." to the said Exhibits No. 13, No. 14, and No. 15, and the several superscriptions thereon, were and are respectively of the proper hand-writing and subscription of the said John William Henry Dalrymple, Party in this Cause, and that by the words "My dearest sweet wife," "My dearest sweet love," "My beloved wife," and such like, as well as various other expressions contained in the said letters was meant and intended the said Johanna Dalrymple, formerly Gordon, Party in this Cause. And also that John William Henry Dalrymple, who wrote, subcribed, and superscribed the said letters, and Johanna Dalrymple, to whom the same were addressed, under her maiden name of Gordon, and John William Henry Dalrymple, and Johanna Dalrymple, formerly Gordon, the Parties in this Cause, were and are the same persons, and not divers: and further he cannot depose.

SAMUEL HAWKINS.

Same Day.

Repeated and acknowledged before
Dr. Ogilvie, Surrogate.

Pres. Mark Morley,
Notary Public.

On the Libel and Exhibits given on behalf of Mrs. Dalrymple.

1st May 1809.

ALEXANDER BRYANT, Clerk to Messrs. Thomas Coutts and Company, Bankers, in the Strand, in the County of Middlesex, aged thirty years and upwards, a Witness, produced and sworn.

MR. ALEXANDER BRYANT.

2. TO the second article of the said Libel, and to the Paper-writings or Exhibits, marked No. 1, and No. 2, annexed to the said Libel, and now produced and shewn to the Deponent, he saith,

MR. ALEXANDER BRYANT.

saith, he is a Clerk in the House of Messrs. Thomas Coutts and Company, Bankers, in the Strand, and hath so been for about seven years come next June, and he came first to know the articulate John William Henry Dalrymple, Party in this Cause, about three or four years ago, (according to the best of his recollection as to time) by seeing him come to the banking-house of the said Messrs. Thomas Coutts and Company, upon business; and afterwards many letters came from him written from Germany to the said banking-house, which the Deponent knows were answered; and that such answers were addressed to him, the said John William Henry Dalrymple, in Germany: and he further saith, that about a year ago (as well as he is now able to recollect the time) the said John William Henry Dalrymple, having returned from Germany, became in the habit of coming to the said banking-house when he wanted money, and hath from that time, down to the present time, been in the habit of so doing, and at such time he always signs drafts for the money he so draws out at the said house of Messrs. Thomas Coutts and Company, who are his bankers; and the Deponent is the person to whom the said John William Henry Dalrymple hath been in the general habit of coming to on those occasions. And he, the Deponent, hath thereby had occasion to see the said John William Henry Dalrymple sign his name to drafts so frequently, that he hath thereby and by seeing the aforesaid correspondence of him the said John William Henry Dalrymple with the said house, whilst he remained in Germany as aforesaid, become perfectly well acquainted with the manner and character of hand-writing and subscription of him the said John William Henry Dalrymple, and having now carefully and attentively viewed and perused the said two Exhibits, marked No. 1, and No. 2, the Deponent saith, that he hath not the least doubt, but does verily and in his conscience believe, that the words "I do hereby promise to marry you as soon as it is in my power, and never marry another," contained in the said Exhibit, marked No. 1, and the name "J. Dalrymple," thereto subscribed, and also the words and figures "I hereby declare that Johanna Gordon is my lawful wife, May 28th 1804," the subscription, "J. Dalrymple," and the further words, "and I hereby acknowledge John Dalrymple as my lawful husband," contained in the said Exhibit, marked No. 2, were and are of the proper hand-writing and subscription of him the aforesaid John William Henry Dalrymple, whom the Deponent knows to be the Party in this Cause, and that John William Henry Dalrymple,

MR. ALEXANDER BRYANT.

rymple, who was a party to and signed the said two Exhibits, and John William Henry Dalrymple, Party in this Cause, herein before deposed of, was and is one and the same person. And further to the said article he cannot depose.

7. To the seventh article of the said Libel, and to the Paper-writings, or Exhibits, marked No. 10, and No. 11, to the said Libel annexed, and in the said seventh article particularly pleaded and referred to, the same having been now produced and shewn to, and carefully viewed and perused by the Deponent, he saith, that he does verily and in his conscience believe, that the whole body, series, and contents of the said Paper-writing, or Exhibit, marked No. 10, and the name "J. W. H. Dalrymple," thereto subscribed, to be all of the proper hand-writing and subscription of him the aforesaid John William Henry Dalrymple, Party in this Cause, the person of whom the Deponent hath herein-before particularly deposed of, excepting the name "J. Gordon," and the word "now" subscribed and written at the bottom of the said Exhibit, and also except the name and word "Witness, Charlotte Gordon," written under it, which he does not believe to be of the hand-writing of him the said John William Henry Dalrymple, and knows not of whose hand-writing the said two names and words are, nor can he take upon himself to depose of whose hand-writing the said Exhibit, No. 11, or of any part thereof, or of the initial letters "J. D." or "J. G." subscribed thereto, is or are, but has no doubt but that John William Henry Dalrymple, who was a Party to the said exhibit, marked No. 10, and John William Henry Dalrymple, Party in this Cause, hereinbefore particularly deposed of, was and is one and the same person, and not divers: and further he cannot depose to the said article.

10. To the tenth article of the said Libel, and to the Paper-writings, or Exhibits, marked No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 12, No. 13, No. 14, and No. 15, to the said Libel annexed, and in the fourth, fifth, eighth, and ninth articles of the said Libel, particularly pleaded and exhibited, the same having been now produced and shewn to the Deponent, and he having carefully and. attentively viewed and perused the same, the Deponent saith, that he hath not a doubt, but does verily and in his conscience believe, the whole body, series, and contents of the said several Exhibits, numbered as aforesaid, and the initial letters "J. D." to the said Exhibits, No. 3, No. 4, No. 5, No. 7, No. 8, and No. 9, the initial letter "D." to the said Exhibits, No. 12, No. 14, and No. 15, and the initial letters "J. D." to the

MR. ALEXANDER BRYANT.

the said Exhibit, No. 13, and the superscriptions thereon, were and are respectively of the proper hand-writing and subscription of the said John William Henry Dalrymple, Party in this Cause, hereinbefore particularly deposed of, and that the said John William Henry Dalrymple, who so wrote, subscribed, superscribed, and sent the said letters, and John William Henry Dalrymple, Party in this Cause, was and is one and the same person, and not divers: but further to the said article he cannot depose.

ALEX. BRYANT.

Same day.
Repeated and acknowledged before
Dr. OGILVIE, Surrogate.

Pres. MARK MORLEY,
Notary Public.

On the LIBEL and EXHIBITS given on behalf of MRS. DALRYMPLE.

6th May 1809.

The Most Noble ALEXANDER, DUKE OF GORDON, of New Norfolk Street, Park Lane, in the County of Middlesex, aged sixty-five years, a Witness, produced and sworn.

DUKE OF GORDON.

2. TO the second Article of the said Libel, and to the Paper-writings marked No. 1, and No. 2, therein pleaded and referred to, and now produced and shewn to the Deponent, he saith, that he hath been on terms of great intimacy with the family of the articulate Johanna Gordon (in the said Libel called Johanna Dalrymple), for many years, and hath known and been acquainted with the said Johanna Gordon from her childhood, and hath frequently received visits from her, with her father and others of her family, at his, this Deponent's seat, called Gordon Castle, in Scotland; and hath also been on visits to her father, and hath there been in company with her, and in the course of such his knowledge of, and acquaintance with her the said Johanna Gordon, he often saw her write and subscribe her name, and thereby became well acquainted with her manner and character of hand-writing

DUKE OF GORDON.

writing and subscription, and having now attentively viewed and perused the said two Paper-writings, marked No. 1, and No. 2, he saith, he hath not the least doubt, but does verily and in his conscience believe, that the words "& I promise the same," contained in the said Exhibit marked No. 1, and the name, "J. Gordon," thereto subscribed, and also the words, "And I hereby acknowledge John Dalrymple as my lawful husband," contained in the said Paper-writing or Exhibit, marked No. 2, and the name, "J. Gordon" thereto subscribed, were and are of the proper hand-writing and subscription of the aforesaid Johanna Gordon, in the said Libel called Johanna Dalrymple, by him the Deponent hereinbefore deposed of, but he cannot take upon himself to depose of whose hand-writing the other parts of the said two Paper-writings or Exhibits are, but he saith, that he is well satisfied in his own mind that Johanna Gordon, who was a party to, and signed the said two Paper-writings, marked No. 1, and No. 2, and Johanna Gordon by him the Deponent hereinbefore deposed of, whom he knows to be one of the Parties in this Cause by the name of Johanna Dalrymple, wife of the articulate John William Henry Dalrymple, was and is one and the same person, and not divers; and further he cannot depose to the said Article.

7. To the seventh Article of the said Libel, and to the Paper-writings, or Exhibits, marked No. 10, and No. 11, therein pleaded and referred to, and now produced and shewn to the Deponent, he having carefully viewed and perused the same, he saith, that he hath not the least doubt, but does verily and in his conscience believe, that the name and word, "J. Gordon, (now) J. Dalrymple," set and subscribed to the said Paper-writing, or Exhibit, marked No. 10, were and are of the proper hand-writing and subscription of the aforesaid Johanna Gordon, by him the Deponent hereinbefore deposed of, and who is in the said Libel called Johanna Dalrymple; but he cannot take upon himself to depose to the hand-writing of the other parts of the said Paper-writing, or Exhibit, or of any part of the said Paper-writing or Exhibit, marked No. 12. And the Deponent lastly saith, that from circumstances which have come to his knowledge he hath not the least doubt, but does verily believe that Johanna Gordon, now Dalrymple, who was a party to and signed the said Paper-writing, or Exhibit, marked No. 10, and Johanna Gordon, by him, the Deponent, hereinbefore deposed of, and who is one of the Parties in this Cause, by the name of

Johanna Dalrymple, wife of John William Henry Dalrymple, was and is one and the same Person, and not divers; and further he cannot depose.

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GORDON.

Same day,

Repeated and acknowledged before
Dr. STODDART, Surrogate.

Pres. MARK MORLEY,
Notary Public.

On the LIBEL and EXHIBITS given on behalf of Mrs. DALRYMPLE.

7th June 1809.

THE HON. HENRY ERSKINE.

THE HONOURABLE HENRY ERSKINE, of Ammondell, Advocate, aged about sixty-two years, a Witness produced and sworn, deposes and says, that he has practised as an Advocate in the supreme Court of Session, in Scotland, since 1768, and that he has formerly held the situations of his Majesty's Advocate for Scotland, and Dean of the Faculty of Advocates; and further, to the 11th Article of the said Libel he deposes and says, that he has attentively perused and considered the several Exhibits annexed to the Libel, and that, by the Law of Scotland, marriage is merely a civil contract, and may be validly and effectually entered into without the intervention of any religious ceremony in any of the three following ways:

1. By a promise of marriage given in writing, or proved by a reference to the oath of party followed by a copula.

2. By a solemn and deliberate mutual declaration exchanged between a man and a woman, either verbally, or in writing, expressed *per verba de præsenti,* bearing that the parties consent to take each other for husband and wife, a marriage may be formed without any copula, cohabitation, or celebration *in facie ecclesiæ.*

3. Marriage may be established by public cohabitation as man and wife alone. That such being the Law of Scotland, the said exhibits annexed to the libel, are, in the Deponent's opinion, sufficient to establish a legal and effectual marriage between the Plaintiff and the Defendant in the said Cause, independently of any actual celebration, copula, or cohabitation as man and wife.

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The same Witness examined on the Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said Interrogatories this Respondent answereth and saith, that he believes that there is no country to be found, the Law of which, on any particular subject, has not been liable to variations; but the principles of the Law of Scotland, in regard to the validity of marriage, have always been substantially the same as already deposed to; he conceives that any apparent discrepancy that may be found in the decisions of the Court, arises not from any difficulty as to the principles but the application of them to the facts of particular cases, as amounting, or not amounting, in the opinion of the Court, to that solemn and deliberate consent necessary to constitute marriage, and which, when proved to have been adhibited, has uniformly been adjudged sufficient *per se* to constitute a legal marriage.

2. To the second of the said Interrogatories this Respondent answereth and saith, that he collects, or ascertains, the Law of Scotland, regarding the validity of marriages not regularly celebrated or performed, from the writings of the different authors on its Law, and the train of decisions of its Courts; upon these he forms his opinion what is the precise Law of Scotland at the present day, to which he has already deposed.

3. To the third of the said Interrogatories this Respondent answereth and saith, that there certainly is a material difference between the legal effects of an irrevocable obligation *de futuro* to marry, and an actual marriage (whether constituted by celebration *in facie ecclesiæ*, or by an express consent *de præsenti*,) which last he has already said is equivalent to actual celebration. A promise of marriage, followed by a copula, is just as effectual to produce marriage as actual celebration, or a declaration of consent *de præsenti*; but as a copula cannot, like a written promise of marriage, be proved without the testimony of witnesses, a process at law is necessary to establish a marriage of this description where one of the parties denies its existence. In this respect, a promise and subsequent copula differ from a solemn mutual declaration of consent *de præsenti*, which requires nothing more to complete it, though, were one of the parties to desert, a process of adherence might be necessary, which it would equally be, had a marriage been celebrated *in facie ecclesiæ*.

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4. In answer to the fourth of the said Interrogatories this Respondent answereth and saith, that he conceives this question to be already sufficiently answered. Where a man binds himself irrevocably by an obligation *de futuro* to marry, and no copula follows, then, certainly the woman, and even the man, may marry a different person, because it is the copula alone that bars the party who gives the promise from resiling. The same would be the case with mutual promises of marriage *de futuro* interchanged, but without consummation.

5. In answer to the fifth of the said Interrogatories this Respondent answereth and saith, that presuming the Interrogatory to apply to a promise of marriage not followed by a copula, such promise may at any time be made the ground of a declarator of marriage, unless the party giving the promise shall in the mean time have married another woman, which, as I already said, he may validly do, notwithstanding the previous promise. It would be otherwise, if, instead of a promise *de futuro*, a man and woman had made mutual declarations of consent *de præsenti*, for this, whether followed by a copula or not, would have constituted a marriage, as effectually as celebration *in facie ecclesiæ*.

6. To the sixth of the said Interrogatories this Respondent answereth and saith, that a promise of marriage, given in Scotland, followed by a copula, would not be affected by the man's going to England, instead of remaining in Scotland. The question, whether if a man who has given a promise of marriage, and consummated in Scotland, should afterwards marry another woman, no action having presently been brought against him, on the previous promise and copula, such marriage would be good, may admit of doubt, though there could have been none, if, instead of a promise *de futuro* by the man to the woman, there had been mutual declarations of consent *de præsenti*. It is in this, that the difference between the one mode of constituting marriage by the law of Scotland, and the other, chiefly consists. At the same time, the Deponent knows of no case where a marriage made by a man with one woman, after he had given a promise of marriage to another woman, followed by a copula, was found to be good, though he considers that the principle, recognized in a case observed by Lord Stair, 31st January 1675, Blattie contra Barclay, would support the general proposition, that though a promise of marriage and copula entitles the woman to have the marriage declared, yet it has not the same effect as a formal marriage in all respects, though, not that it might be defeated by the man's

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marrying another woman *in facie ecclesiæ*, before a decree of declarator was obtained against him. But this Respondent saith, that where the marriage is constituted by mutual declarations *de præsenti*, every consequence must follow equally as from the most formal marriages, and, therefore, that a marriage with another person afterwards entered into by either of the parties would be null, though no declarator had been previously obtained; and whether such subsequent marriage took place in Scotland or England, or the party contracting it was a Scotsman, or a domiciled Englishman, or possessed or not possessed of any property or effects in Scotland.

7. In answer to the seventh of the said Interrogatories this Respondent answereth and saith, that if a man gives a declaration in writing to a woman, whereby he declares her to be his lawful wife, such a declaration constitutes a lawful marriage, and not merely an obligation to marry.

8. In answer to the eighth of said Interrogatories this Respondent answereth and saith, that such a declaration in writing, *per se*, renders the marriage complete; and that the copula being before or after the declaration, can have no effect on the validity of the marriage.

9. In answer to the ninth of said Interrogatories this Respondent answereth and saith, that if a man gives a writing to a woman, acknowledging that he is her husband, and the two parties correspond with each other in writing, calling each other husband and wife, this will constitute a marriage, and not merely an obligation to marry.

10. In answer to the tenth of said Interrogatories this Respondent answereth and saith, that the essence of the consent, by which alone marriage is constituted by the law of Scotland, is its being made seriously and deliberately *animo contrahendi matrimonium*. It is competent therefore to adduce in evidence any circumstances in the mutual conduct of the Parties demonstrative that there was something intended by them when the declarations were given, different from a serious intention to contract marriage. But where the words, in which the declarations are conceived are clear and unambiguous, the case must be made out by facts, completely probative of a contrary intention on the part of both the man and woman. In the case of More contra M'Innes, 20th Dec. 1781, the House of Lords reversed a decision of the Court of Session, which had declared a marriage founded on a written declaration by a man to a woman. But

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that most Honourable House proceeded on an opinion that there was evidence to shew that the declaration had been given and accepted of for a different purpose from that of constituting marriage. The same was the ground of judgment in the House of Lords, in the case of Taylor contra Kello, 16th Feb. 1786. But in neither of these cases was there any doubt expressed by the Noble Lord, who delivered the opinion of the House, that the written declarations would have been sufficient to constitute marriage, if appearing to have been given *eo intuitu*. Further, this Respondent saith, that he does not conceive that mere expressions of fear by the one party of being deserted by the other, or a desire to be married *in facie ecclesiæ*, though expressed by both, would, according to the law of Scotland, have the effect to prevent a previous written declaration of consent *de præsenti*, from establishing a marriage.

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The same Witness examined on the additional Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1, 2. To the first and second of the said additional Interrogatories this Respondent answereth and saith, that he conceives that what he formerly deposed, in answer to the second of the original Interrogatories, affords a sufficient answer to both these additional Interrogatories. Sir Thomas Craig, and Lord Stair, are two of the authors on whose authority he forms his opinion, and he believes their opinions to be equally agreeable to the law of Scotland, at the time these authors wrote, and to the law of Scotland as it now stands. He knows of no change that has taken place on the general principles of law as laid down by those learned authors, though in applying them to different cases, there may have been a variety of opinions amongst the judges, as there necessarily will be among judges as well as jurymen in circumstantiate cases, where the doubt is as to the fact and not as to the law.

3. To the third of the said additional Interrogatories this Respondent answereth and saith, that he conceives the decision in the Case of Pennycook and Grinton, contra Grinton and Graite, 15th Dec. 1752, to have been agreeable to the principle aid down by Sir Thomas Craig and Lord Stair: That was cer-

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tainly a case attended with very peculiar circumstances, but consonant with these legal authorities, it could not have been otherwise decided, unless the Court, on considering the evidence, had been of opinion that the conduct of the pursuer afforded evidence that the promises upon which she founded, were not of that serious and deliberate nature as when joined with a subsequent *copula* to form a consent *de præsenti*, which is the principle on which Lord Stair holds a *copula* following a promise to constitute a marriage, in the same way as a consent *de præsenti*, or actual celebration.

4. To the fourth of said additional Interrogatories this Respondent answereth and saith, that he knows of no case decided by the Commissaries, since that last mentioned, where precisely similar circumstances occurred; that he has already noticed in his former deposition, the cases of More contra M'Innes, and Taylor contra Kello, where the House of Lords differed from the Court of Session as to the sufficiency of the evidence of consent to constitute marriage; but he repeats that in those cases the judgments were reversed solely on this ground, that the learned judge who decided was of opinion, in point of fact, that the written declarations had not been granted with a view to constitute a marriage, but for different purposes. That the judgment of the Court of Session and the House of Lords therefore were equally consistent with what this Respondent has already deposed to be the law of Scotland.

5. To the fifth of said additional Interrogatories this Respondent answereth and saith, that where the law in any case appears to be clear on general principles, the Court of Session are in use to disregard a solitary decision, contrary to those principles, and to decide as if no such decision had existed; but the Respondent is clearly of opinion that where a *series rerum judicatarum* occurs, and those decisions are consonant with the opinions of the learned writers on the law, the Court of Session would be exceeding their power were they to disregard these former decisions, and he knows that it is not the practice of the Court to do so.

6. To the sixth of the said additional Interrogatories this Respondent answereth and saith, that he considers what he has just said as a full answer to this Interrogatory, with this addition, that where the Court of Session doubt as to a point formerly decided, they usually have it heard in their presence, both on the general

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general principles that apply to the case, and upon the effect that ought to be given to former decisions.

7. To the seventh of said additional Interrogatories this Respondent answereth and saith, that taking this Interrogatory generally, he conceives it to be already answered; that if it imports the question whether in the witness's opinion the Court of Session are bound by the existing precedents on the law of marriage, he has no difficulty to say that they are so bound, not only from the number of them, and the uniformity of principle that pervades them all, but from their consonance with the opinions of the law-writers of the first eminence both ancient and modern.

8. To the eighth of said additional Interrogatories this Respondent answereth and saith, that he considers the case of Pennycook to be of authority, and recognized by subsequent practice as to the principle on which it proceeded, viz. that a promise *cum copulâ* makes a complete marriage. Lord Kaimes, in his Elucidations, No. 5, says, "The judges were almost unanimous that a promise *cum copula* makes a complete marriage," which is precisely the doctrine laid down by Lord Stair.

9. To the ninth of said additional Interrogatories this Respondent answereth and saith, that he conceives he has already answered this Interrogatory.

10. To the tenth of said additional Interrogatories this Respondent answereth and saith, that where writings sufficient *per se* to constitute a marriage exist, the marriage is thereby constituted, and therefore their not being produced till one of the parties has married another, can have no legal effect to annul the prior marriage. At the same time, as such prior marriage, whether constituted by mutual declarations *de præsenti*, or by a promise of marriage and *copula* subsequent, rests entirely upon consent, and in every such case it must be at issue whether such consent was solemn and deliberate, *animo contrahendi matrimonium*, or otherwise; the conduct of the party alledging the marriage must necessarily be an important ingredient in the evidence, and his or her having withheld the writings, and kept back her claim, when aware that the other party was publicly forming a matrimonial connection, may certainly be founded on in the question of fact. But it can have no effect on the law of the case; as no act of one of the parties can dissolve a marriage, once legally constituted, by any of the forms by which the law of Scotland allows marriage to be constituted, whether by actual celebration, by mutual

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declarations of consent *de præsenti*, or by promise of marriage *de futuro*, changed into consent *de præsenti*, by the intervention of a *copula*.

11. To the eleventh of said additional Interrogatories this Respondent answereth and saith, that he considers what he has just said in answer to the immediately preceding Interrogatory, as a sufficient answer to this Interrogatory.

12. To the twelfth of said additional Interrogatories this Respondent answereth and saith, that all contracts solemnly entered into according to the law of the country where the parties are resident for the time, must be binding, whether the parties are strangers or natives, or domiciled or not domiciled, in such place. That the Respondent knows of no distinction between officers of the army and other strangers in this respect. And he has no doubt that were an officer of the army to live with a woman in Scotland, and pass her as his wife, it would be sufficient to constitute a marriage, unless there were circumstances of fact to shew that there had been an understanding between the parties to the contrary; for the evidence of such understanding would put an end to that evidence of consent, by which marriage by the law of Scotland is effectually constituted. But the Respondent conceives that the mere allegation of the one party that marriage was not intended, and that being a stranger he was unacquainted with the law of Scotland, will not avail him. In the case of Margaret Aitken, contra Topham, an Englishman, who, on several occasions, had acknowledged her as his wife, Topham's plea, that he was ignorant of the law of Scotland, and that on the occasions when he called her his wife, he did so merely as a cover, was overruled. In that case no decision was ever pronounced, it having been discovered that Margaret Aitken was married before her connection with Topham, and that her husband was still alive.

13, 14, 15, 16, 17. To the thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth of said additional Interrogatories this Respondent answereth and saith, that these Interrogatories appear to him to be entirely hypothetical and unconnected with the question at issue, and that he does not consider himself as at liberty to give any decided opinion, having no authorities of the law of Scotland to direct him. His own impression is, that on the principle peculiar to the law of Scotland, a promise of marriage, followed by a *copula*, constitutes a marriage, on the footing that the promise by virtue of the *copula* becomes a consent *de*

præsenti;

præsenti; the promise and the *copula,* in order to constitute a marriage, should both take place in Scotland; and that where this is the case, the domicile of the parties is as much out of the question as if the marriage were celebrated in Scotland *in facie ecclesiæ,* which may be the case, though the domicile of both or either of the parties may be in a different country.

18. To the eighteenth of said additional Interrogatories, this Respondent answereth and saith, that he has already deposed to the principle upon which a promise and copula constitute a marriage, viz. that to use the words of Lord Stair, " by natural commixtion, where there hath been a promise preceding, there is presumed a conjugal consent *de præsenti.*" And therefore the Respondent is of opinion, that where a promise and copula occur, neither party is at liberty to contract another marriage any more than if the marriage had been established by express mutual consent *de præsenti,* or even a celebration *in facie ecclesiæ,* which last has no stronger effect by the law of Scotland than either of the former, except that it proves more indubitably that serious and deliberate consent which alone is required to constitute marriage.

19, 20. To the nineteenth and twentieth of said additional Interrogatories this Respondent answereth and saith, that where the obligation or promise to marry is merely *de futuro,* and no copula has followed to convert the promise *de futuro* into a consent *de præsenti,* the party resiling can only be subjected in damages: the case would be different if there were evidence of a solemn and deliberate consent *de præsenti,* for there would be legal grounds for declaring a marriage independent of a copula.

21. To the twenty-first of said additional Interrogatories this Respondent answereth and saith, that he conceives that this query is already sufficiently answered, and that the doctrine of Mr. Erskine, in the passage referred to in the query, does, in the Respondent's apprehension, completely establish the proposition; that to use the words of that learned author, in the passage referred to, " Both our judges and writers are agreed that a copula, subsequent to a promise, constitutes marriage, from a presumption or fiction that the consent *de præsenti,* which is essential to marriage, was at that moment mutually given by the parties, in consequence of the anterior promise. St. b. 1. t. 4. s. 6. and b. 3. t. 3. s. 42, and New Coll. No. 146. " That the same writer, the latest and not the least respectable authority in the

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the law of Scotland, speaking in the subsequent section of the constitution of marriage by the consent *de præsenti*, expressly states it as capable of being perfected without the intervention of any ceremony by the mere consent of parties declared by writing, provided the writing be so conceived as necessarily to import their present consent."

22. To the twenty-second of said additional Interrogatories this Respondent answereth and saith, that although a promise of marriage and copula subsequent, create a legal presumption that a mutual consent was given at the moment of the copula, yet certainly it must be open to the party either to disprove the existence of the promise, or to prove *habili modo*, that it was made *alio animo*, than that of constituting marriage. That the same is the case even in mutual written declarations of consent *de præsenti*; and it was on this ground, that the decisions in the case of More and M'Innes, and Taylor and Kello, proceeded. Indeed, as marriage *in facie ecclesiæ*, by the law of Scotland, is neither a sacrament nor a necessary ceremony to constitute the matrimonial union, that cases might occur where a marriage by a clergyman might be insufficient from its being proved that anterior to the celebration, the parties had interchanged written declarations that the ceremony was to be effected for a totally different purpose, and should not be binding upon either of them. But the Respondent conceives, that to take off the effect of a written consent *de præsenti*, or a promise of marriage followed by a copula, will require the most clear and decisive facts applicable to both the parties, sufficient to shew that the written declaration or promise was given for a purpose different from that of contracting marriage, and a proof of those facts by the most unexceptionable evidence.

23. To the twenty-third of said additional Interrogatories this Respondent answereth and saith, that in his opinion it matters not whether the promise has been given by the woman or by the man, if a copula follows, as the promise and copula taken together amount to a mutual consent *de præsenti*.

24. To the twenty-fourth of said additional Interrogatories, this Respondent answereth and saith, that he has already said that the doctrine that a promise of marriage with a subsequent copula does actually constitute a marriage, is not only reconcileable with the ancient authorities in the law of Scotland, including those of Sir Thomas Craig and Lord Stair, but is expressly laid down by those learned lawyers, and especially by Lord Stair. As

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to the question whether the work of Lord Stair contains many mistakes, and whether the passages referred to are not loosely and inaccurately expressed, the Respondent says, that Lord Stair, like every other writer, may have fallen into errors; but he considers his Lordship as an author of the very highest authority, and, as to the passages referred to, the Respondent sees neither looseness nor inaccuracy. That as to the question what degree of weight ought to be given to Lord Stair's authority, or to the editions of his works, as proving to a certainty what his opinion was, the Respondent can give no answer further than that in the court, on this as well as on every other subject, the greatest deference has always been paid to Lord Stair's authority.

25, 26. To the twenty-fifth and twenty-sixth of said additional Interrogatories this Respondent answereth and saith, that contracts of marriage, though merely *sponsalia de futuro*, are no doubt conceived *per verba de præsenti*, as expressed in the query, but in practice there is always superadded an obligation to celebrate the marriage with all convenient speed, which is sufficient to confine the former expression to a mere obligation *de futuro*. Where one of the parties therefore resiles, a claim of damages only will lie, as in the case of a promise of marriage not followed by copula; though if a copula were to follow a contract of marriage, it would become a consent *de præsenti*, and the marriage would be completed. That the Respondent considers the expressions of consent contained in the exhibits, followed as they are by no obligation to complete a marriage by actual celebration, as a complete consent *de præsenti*, such as the law holds sufficient *per se* to constitute marriage, and therefore very different from the expressions of consent usually contained in contracts of marriage.

27. To the twenty-seventh of said additional Interrogatories this Respondent answereth and saith, that in his examination in chief, he has already deposed, that he considers the exhibits, particularly the mutual declaration, as sufficient *per se* to constitute a marriage between the parties; and it is unnecessary, therefore, to add, that they are of such a nature, as to bar either of the parties from retracting. That the Respondent considers the effect of the exhibits to be such, that in a question with any third party having an interest, a mutual retraction by the parties would be of no avail, nor could it even, as between themselves, have any effect to annul the marriage, however it might affect their patrimonial interest, as husband and wife.

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28. To the twenty-eighth of said additional Interrogatories this Respondent answereth and saith, that the first part of it has been already answered; that as to the latter question, what would have been the Defendant's remedy if the Plaintiff had destroyed the Exhibits? the answer is very plain, he would just have been in the very same situation with any other party to a mutual contract, where there is but one copy of the agreement, and that has been destroyed by the other party, to whom the custody of it was given. The party founding upon it, would be under the necessity of either proving the tenor of the writing, or establishing the existence of the agreement, by a reference to the oath of the other party; but it is impossible to suppose, that because one of the parties might have destroyed the document, it shall therefore have no binding effect upon either of them.

29. To the twenty-ninth of said additional Interrogatories this Respondent answereth and saith, that he does not know any case before that of M'Adam contra M'Adam, where precisely in such circumstances, a mere declaration of consent *de præsenti* was held to constitute a marriage, *per verba de præsenti*. But he knows of no case where that general proposition has been seriously disputed; and it is laid down as the law of Scotland by all the authorities already referred to. Indeed the proposition taken in the abstract was scarcely disputed in the case of M'Adam; the argument of the party who disputed the effect of the declaration, being chiefly directed to an attempt to show that the declaration could not have been seriously and deliberately made *animo contrahendi matrimonium*, and that Mr. M'Adam at the time he made it, was in a state of insanity, which fact was the subject of a long proof, which would have been altogether unnecessary, if in point of law such a declaration of consent *de præsenti* was insufficient to constitute a marriage.

30. To the thirtieth of said additional Interrrogatories this Respondent answereth and saith, that he conceives that he has already answered this query, by what he has said in answer to the twenty-fifth of said additional Interrogatories.

31. To the thirty-first of said additional Interrogatories this Respondent answereth and saith, that where a marriage has taken place between a man and woman, in the way and manner which the law of Scotland authorizes, neither of the parties can marry again, and it is not in the power of one of the parties to annul the marriage by lying by, while the other contracts a marriage

marriage with another. If therefore a promise of marriage, followed by a copula, does by the law of Scotland constitute an effectual marriage, it follows that the second marriage, however public and regular, would be void according to the law of Scotland, just in the same way as if the first marriage, as well as the second, had been celebrated *in facie ecclesiæ.* That the only effect, which, in the Respondent's opinion, could be given to the woman claiming in virtue of the promise and copula, having lain by, without objecting to the second marriage taking place, knowing it to be seriously intended, would be this; that her conduct would afford a strong piece of presumptive evidence to show, that the promise of marriage had not been seriously made or received, and therefore was not such a promise as the law requires, when followed by a copula, to constitute a marriage. But the Respondent does not conceive that this conduct on the part of the woman, would, independently of other circumstances, be sufficient to take off the effect of the promise and copula; and the Respondent presumes, that in the case observed by Lord Stair, 31st January 1675, Beattie contra Barclay, referred to in the Respondent's answer to the fifth of the original Interrogatories, the court must have proceeded on something more than merely the woman's having lain by, without bringing a declaration of marriage against him. The man, in that case, does not appear to have married another; nothing more was found, than that the presumption *pater est quem nuptiæ demonstrant* did not take place as if there had been a formal marriage, so that the woman was bound to prove a copula after the date of the promise.

The same Witness examined on the further additional Interrogatories, given on behalf of John William Henry Dalrymple, Esq. the other Party in this Cause.

1. To the first of the said further additional Interrogatories this Respondent answereth and saith, that he considers the decision, in the case of Jean Campbell contra Magdalene Cochrane, as one of a very peculiar nature, and that it could not have been decided upon the ground that the conduct of Magdalene Cochrane, in having allowed Mr. Campbell to marry another without objection, was sufficient to bar her claim to have her marriage declared. Magdalene

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Magdalene Cochrane did not alledge merely a promise of marriage and copula following, to which alone such an objection could apply; on the contrary, she expressly averred that she had been privately married to Mr. Campbell, by Mr. William Cockburn, an episcopal Minister, in the presence of witnesses whom she named, so that the marriage which she alledged was every bit as regular as that which Mr. Campbell afterwards contracted with her competitor, which was also an irregular one. It was impossible that the Court could mean to find that a marriage actually celebrated with one woman could be annulled by a marriage with another, merely because the first wife had not previously taken any steps to have her marriage declared; and the Respondent therefore presumes, that as Magdalene Cochrane had no writing to produce, in order to prove the celebration of a former marriage, or even a promise of marriage, the Court must have refused to allow her a proof by witnesses, merely because she offered to establish facts, some of which could only be competently proved by writing, and others which were totally inconsistent with the whole of her own conduct; that if the Court proceeded on any other ground, the Respondent would with great deference presume to say, that the decision was ill founded, and he would be warranted to say so from the subsequent decision in the case of Pennycook and Grinton, contra Grinton and Graite.

2, 3. To the second and third of said further additional Interrogatories this Respondent answereth and saith, that in the case of Elizabeth Lining contra Hamilton, there does not appear to have been any promise of marriage; if there had, there can be no doubt that Elizabeth Lining, instead of being merely found entitled to damages, would have had her marriage declared. That with regard to the cases referred to by Lord Kilkerran, in the first of them, Kerr contra Hislop, there seems to have been no promise of marriage; as to the other, Castlelaw contra Agnew, of Shenchan, the Respondent does not find it collected. Lord Kilkerran is mistaken in saying that in both cases there was a promise of marriage, for the contrary appears, from the case of Kerr contra Hislop, as collected by Lord Fountainhall, and in the other case, his Lordship says, the adherence was not insisted on. That the Respondent does not therefore conceive, that any conclusion can be drawn from Lord Kilkerran's notice of these two cases, inconsistent with the general doctrines of law, to which the Respondent has given his opinion, or tending to show,

show, that by the law of Scotland in 1696, a promise of marriage, followed by a *copula*, did not constitute a marriage.

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4. To the fourth of said additional Interrogatories this Respondent answereth and saith, that he has looked into the passage in Lord Kaimes's Elucidations, referred to, in which he perceives that his Lordship had doubts of the propriety of the judgment in the case of Pennycook and Grinton, contra Grinton and Graite; but with great deference to that learned writer, who very frequently indulged himself in speculations as to what the law of Scotland ought to be, rather than in discussing what it really was, the Respondent continues of opinion, that that case, however hard it may appear, was decided upon the true principles of the law of Scotland.

HENRY ERSKINE.

22d August 1809.

Repeated and acknowledged before me,
at Edinburgh, the undersigned
Wm. Coulter, Lord Provost.

In the Presence of Harry Davidson,
Not. Pub. and Actuary assumed.

On the Libel and Exhibits given on behalf of Mrs. Dalrymple.

7th June 1809.

ROBERT CRAIGIE, ESQ.

ROBERT CRAIGIE, Esq. of the city of Edinburgh, Advocate, aged about fifty-three years, a witness produced and sworn, deposes and says, that he has practised as an Advocate before the supreme Court of Session in Scotland since 1776; and further to the eleventh article of the said Libel, he deposes and says, that he has attentively perused and considered the several Exhibits annexed to the Libel, and that according to his opinion and belief, by the law of Scotland, marriage may be completed between two persons of proper age and free to enter into such an engagement, not only by actual celebration *in facie ecclesiæ*, but by cohabitation as man and wife, and also by a mutual declaration of the parties to that effect; and besides this, it appears to the Deponent to have been settled in the case of Pennycook contra Grinton,

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Grinton, 15 Dec. 1752, and the authorities there quoted, and the Deponent believes has been since held as law, that a promise of marriage followed with a *copula* does not merely warrant the courts of law to compel performance of the promise, but without any judicial interference constitutes that relation between the parties. But although all these are legal modes of constituting marriage by the law of Scotland, the one first mentioned is the only one which can be deemed altogether unexceptionable, and not admitting of any proof or argument to the contrary: all the others, though affording *prima facie* evidence of a marriage, admit of explanation from collateral circumstances. It is held to be competent to prove that the acts were not meant by the parties to constitute a marriage, nay, it has been determined that the effect of them might be wrought off by the after-conduct of parties, at least so far as third parties are interested. These propositions the Deponent considers as established by the decisions 20th December 1781, More contra M'Innes; 3d March 1786, Robertson contra Inglis; 16th February 1786, Taylor contra Kello; 6th December 1796, M'Laughlane contra Dobson; 13th June 1801, Napier not reported; and 29th June 1751, Campbell contra Cockrane, not reported; but the particulars to be found in the Session Papers, in the case of Napier. In the present case there has been no regular marriage, nor, as the Deponent thinks, cohabitation as man and wife, in the legal sense of these words. The Plaintiff's claim, therefore, on the Deponent's opinion, must rest on one or other of the two grounds last mentioned, viz. either a mutual declaration, or acknowledgment, as to the parties being man and wife; or a promise and *copula*: and the evidence as to the obligation or engagements of the parties which has been produced, appear to be of three kinds; No. 1. of the Exhibits contains a promise of marriage; No. 2. contains a mutual acknowledgment, as explicit as possible, that the parties were man and wife; in No. 10, there is an acknowledgment equally explicit on the part of the Defendant, but the counter part of it by the Plaintiff appears, in the Deponent's opinion, to import a promise or undertaking that unless in extreme necessity (the nature of which is not mentioned) she would never avow the connection, which at least, in a question with third parties, might, in certain circumstances, preclude a claim on her part to the conjugal rights. In No. 14. there is a request on the part of the Defendant for another declaration by the Plaintiff, which, if it was sent and conceived in unqualified terms, would, in the Deponent's opinion,

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opinion, import a mutual engagement; and in the other numbers there are expressions, which the letters having been received and not rejected by the Plaintiff, may (as the Deponent thinks) be considered as binding on her, and therefore forming a mutual engagement. And especially, if these letters could be combined and connected with letters by the Plaintiff in the same or similar terms, and not counteracted by inconsistent acts or other expressions of a contrary tendency, this also, in the Deponent's opinion, would be sufficient to establish a marriage: but without such letters from the Plaintiff the Deponent conceives it may with some justice be contended, that the letters from the Defendant can only be considered as a promise of marriage; and from some passages in the letters, (vide particularly No. 4, 5, 12, 13, 14,) there appears to the Deponent some room to think, that notwithstanding the promises and declarations, and the appellations of husband and wife, and other expressions of similar import, the Defendant did not consider himself or the Plaintiff to be unalterably bound, but that either might withdraw from the connection and marry with another person. And there are also some passages which, in the Deponent's opinion, tend to create a belief that the Plaintiff in her letters had expressed herself to the same effect; and these explanations appear to the Deponent to limit and qualify, not only the letters, but also the promise and declarations, all of them being to be taken together, and the true deliberate meaning of the parties to be extracted from the whole. As to the evidence of the copula, it appears to the Deponent, that it had been attempted in the end of May 1804, No. 4, but then for the first time: but from other passages in the same letter, and also in No. 5, in the Deponent's opinion, it may be strongly inferred that a copula had taken place. And the arrangements as to "a room" in No. 6 and 7, go strongly, as the Deponent thinks, to authorize a conclusion that a copula had taken place. From the foregoing explanation and analysis of the evidence, the result in the Deponent's opinion and belief is, that if the question were to be tried in Scotland, and if no other or further evidence could be obtained, the decision it is thought would be favourable to the Plaintiff; but it is thought that in the circumstances of this case the courts of law in Scotland would not immediately proceed to a determination upon the evidence as it stands. As the Plaintiff might compel the Defendant to produce the letters written by her to him, and in general all writings that had passed between them, the courts would, in all probability, afford the necessary authority for these purposes. And if the copula has not been expressly

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expressly admitted in the pleadings for the Defendant, they would allow also a proof on that subject.

RO. CRAIGIE.

The same Witness examined on the Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said Interrogatories this Respondent answereth and saith, that the law of Scotland, in regard to the validity of marriages not regularly celebrated, cannot well be said in general to be doubtful and indefinite. But the application of the law to existing cases, has, from the circumstances already mentioned by the Respondent, become oft times very doubtful and uncertain.

2. To the second of the said Interrogatories this Respondent answereth and saith, that the law of Scotland, as to marriages not regularly celebrated, depending on no express enactments, must be gathered from the authorities of writers on the law, and the decisions of the courts of law in Scotland; and, upon an observation of those authorities and precedents, the Respondent's opinion has been formed with regard to such marriages.

3. To the third of the said Interrogatories this Respondent answereth and saith, that, if "by an irrevocable obligation to marry," is meant a promise unconditional and absolute on one side, or even a mutual promise with regard to a marriage *in futuro*, not followed with copula, this in certain circumstances may authorize a claim of damages; but if such promise to marry be followed with a copula, or consummation, it will, as has been already deposed to, constitute a marriage, and not merely an obligation to marry.

4. To the fourth of the said Interrogatories this Respondent answereth and saith, that in the case where the obligation to marry is unilateral, that is, proceeding from the man or the woman, without any thing expressive of or implying a mutual obligation on the other side, it cannot be held to constitute marriage; and consequently it will not afford an effectual bar to a marriage with a third party.

5. To the fifth of the said Interrogatories this Respondent answereth and saith, that in all cases the right to have a marriage declared must depend upon the reciprocal obligations of the parties

parties at the time when the right is to be enforced in a court of law, both of them being bound to perform, or neither.

6. To the sixth of the said Interrogatories this Respondent answereth and saith, that as a promise to marry a particular woman followed by a copula or consummation, in Scotland is held to constitute marriage, it must prevent the man from marrying another woman, and the woman from marrying another man, either in England or any other place; and this, whether the marriage has been declared binding in the courts of law in Scotland, or not: and if the parties are thus effectually married, no marriage afterwards taking place, in England or elsewhere, can, in the Respondent's opinion, be binding, or followed with any legal effects; although exceptions occur in such cases as those of Campbell and Napier, formerly mentioned by the Respondent, where, in consequence of long silence, or taciturnity, as it is called in Scotland, in asserting the conjugal rights, a party has been held to be barred from claiming those rights in a question with another party, who, by reason of that silence or taciturnity, has been led to form a matrimonial connection with the husband or wife of the party so silent or delaying.

7. To the seventh of the said Interrogatories this Respondent answereth and saith, that a declaration in writing given by a man to a woman, or vice versa, without a counter declaration on the other side, can, in general, be held only as implying a promise of marriage; at the same time, if the party to whom the declaration is addressed shall acquiesce in the declaration, or shall by his or her acts and deeds indicate acquiescence, this, without an express written declaration, may be considered as equivalent to a mutual declaration, which, if deliberately given, will be sufficient to constitute a marriage.

8. To the eighth of the said Interrogatories this Respondent answereth and saith, that the question whether a copula prior to a promise will constitute a marriage, or only an obligation to marry if a promise follows, has not, so far as the Respondent knows, been precisely determined; and the result, in the Respondent's opinion, would be somewhat doubtful; though he rather thinks that it would not defeat the ordinary effect of a promise of marriage followed with a copula, that there had been a copula preceding such promise.

9. To the ninth of the said Interrogatories this Respondent answereth and saith, that the mutual declarations of the parties, if clear and in words *de præsenti*, will, in the Deponent's opinion, as formerly stated, constitute marriage, and not merely an ob-

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ligation to marry; or if the parties should correspond with each other, calling themselves husband and wife, this also will, in general, be held sufficient.

10. To the tenth of the said Interrogatories this Respondent answereth and saith, that although in the case last above stated, the law in general stands as he has said, such mutual declarations may be counteracted by other writings of a contrary tendency, or by acts and deeds of the parties affording real evidence to the contrary; and in all those cases, the declarations of the parties must be taken with all the attendant circumstances; and if their is reason to conclude from the expressions used by them, that both, or either of the parties did not understand that they were truly man and wife, or that the declarations were intended for a particular purpose, and not with the view of constituting the irrevocable union of marriage, all this will enter into the question, whether the parties are married, or only under an obligation to marry. But it is almost impossible to say, *a priori*, in what manner, and to what extent, in all circumstances, these qualifications or limitations are to operate.

RO. CRAIGIE.

The same Witness examined on the additional Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said additional Interrogatories this Respondent answereth and saith, that the passages here referred to in Sir Thomas Craig, cannot be held as proof of the Law of Scotland, unless so far as they are supported by the decisions of the courts of law, or the general and concurring opinions of contemporary lawyers. The passages, however, referred to, so far as applicable to the state of the Parties in this Cause, do not appear to differ much, or in substance, from what is now held to be law; neither does it appear to the Respondent, that the law of Scotland, as to what constitutes a valid marriage, has been materially altered since the time of Sir Thomas Craig.

2. To the second of the said additional Interrogatories this Respondent answereth and saith, that the observations immediately before made, appear to him to be applicable to this Interrogatory, as well as to the preceding one.

3. To the third, of the said additional Interrogatories, this Respondent

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Respondent answereth and saith, that the decision here referred to, appears to this Respondent to be agreeable to the authorities there mentioned. It is expressly stated in the report of the case by the Faculty, that the cause was decided on the general point, and the Respondent has been led to consider the law as fixed, although he cannot, at this time, mention any particular case in which the same decision was, *in terminis*, given. And upon the principles there laid down, it appears to this Respondent, that no *bona fides* on the part of a woman entering into a marriage with a man already legally married, according to the principles of the decision, could annul the former marriage, or render the marriage entered into by her a legal or valid one.

4. To the fourth of the said additional Interrogatories this Respondent answered and saith, that he has no recollection of any case similar, or nearly similar, to that of Pennycook ; but, as he has already stated, he has considered, and still considers, that decision as a precedent, the authority of which ought not to be questioned.

5. To the fifth of the said additional Interrogatories this Respondent answereth and saith, that in those cases where there are no express enactments, the Court of Session is in general much governed by precedents ; and where a determination has been given upon a general point of law, after an argument at the bar, or in printed pleadings, it is not usual for the Court to pronounce an opposite judgment. The Respondent, however, understands that it is not one decision, unless it has been long acquiesced in, but a succession of them, or *series rerum judicatarum*, that makes or ascertains what is law: And he has no doubt that there are instances, in which the Court of Session has deviated from what was formerly decided, although he believes it will be found upon examination, that these deviations are much more rare than is sometimes thought; what has been considered a deviation, not being truly such, but arising from a proper discrimination of cases, which, at first sight, appear to fall under the principle of a particular decision, but which are, and ought to be, regulated by a different one.

6. To the sixth of said additional Interrogatories this Respondent answereth and saith, that in those cases where the principles of former decisions are considered to be doubtful, and where they are not understood to have acquired the force of precedents, or where a doubt has been entertained whether the principles of prior adjudications can with propriety be applied to the circum-

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stances of existing cases, it is the practice of the Court of Session to appoint a hearing in presence; and counsel, in such cases, are permitted in general to argue upon the soundness of the principles of law which appear to have governed the decision of former cases, as well as upon the application of those principles to the case before the Court; but in this a due regard is always paid to the date of the decisions, their uniformity, and to the effect that has been given to them in practice, although there has been no second determination in the same, or nearly in the same circumstances.

7. To the seventh of the said additional Interrogatories this Respondent answereth and saith, That this Interrogatory appears to him to be already answered.

8. To the eighth of the said additional Interrogatories this Respondent answereth and saith, as he has already stated, That the case of Pennycook appears to him to have been well decided at the time, and also corroborated by the subsequent practice.

9. To the ninth of the said additional Interrogatories this Respondent answereth and saith, That the Court of Session, though not absolutely debarred from reviewing the principle of the decision in the case of Pennycook, would, in this Respondent's opinion, most reluctantly entertain any argument that could be raised against the authority of the decision; and, in this Respondent's opinion, it would be most unsafe, as well as unusual, at this time to listen to any such argument.

10. To the tenth of said additional Interrogatories this Respondent answereth and saith, That as the writings necessary in order to establish a marriage not celebrated in a formal manner, require no publication in any record, they must be judged of according to their import when they are produced; although they may not have been generally, or publicly heard of, till one of the parties has intermarried with some one else.

11. To the eleventh of said additional Interrogatories this Respondent answereth and saith, that holding a promise of marriage followed by copula, to constitute the relation of marriage, and not merely an obligation to marry, according to the principles laid down in the case of Pennycook, this Respondent thinks no after marriage, however formally celebrated, could annul the former one, or render the second marriage valid. But in judging whether there has been a serious and deliberate promise of marriage, it will properly enter into consideration, that one of the parties deeming himself not married has entered into a formal marriage

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with another person, because it is not probable that a party knowing or believing himself already married, will enter into a second engagement of the same kind; and where the woman, having at one time acted in such a manner as to infer a legal presumption of marriage, has concealed her state in such a manner as to induce another *bona fide* to enter into a marriage with the man with whom she had previously formed such a connection, the decisions in the case of Campbell and Napier go some length to show, that the circumstances here mentioned will be of importance.

12. To the twelfth of said additional Interrogatories this Respondent answereth and saith, That the subject of this Interrogatory, as well as some of the following ones, appears to this Respondent to be inapplicable to the point, or article in the Libel on which this Respondent understands himself to be examined. And it further occurs to this Respondent, that the Defendant, during the early part of his correspondence with the Plaintiff, having been in Scotland for more than forty days, would, by the Law of Scotland, be considered as domiciled there; and in the matter of contracts or obligations, subject to the Law of Scotland in the same manner as if he had been born in Scotland, or had resided in it from his birth. And if truly married to the Plaintiff, according to the Law of Scotland, while residing and domiciled in that country, the circumstance of the Defendant's going back to England, and there marrying Miss Manners publicly before the present action was instituted, could not, in this Respondent's opinion, have any effect upon the previous marriage in Scotland.

13. To the thirteenth of said additional Interrogatories this Respondent answereth and saith, That if an officer, or other person, engaged in military service in Scotland, being an Englishman by birth, and generally domiciled in England, were to have such intercourse with a woman in Scotland, as by the law of Scotland is sufficient to constitute marriage, this would bind such person in the same manner as if he were a Scotsman, or generally domiciled in Scotland. But, in judging of the nature and effects of such intercourse, it would, in this Respondent's opinion, justly enter into consideration, that in England cohabitation as man and wife is not, in all cases, held to constitute marriage; although it may, in certain circumstances, create a presumption of a previous celebration; and consequently, that an Englishman accustomed to the Law of England, might cohabit with a woman in Scotland, and allow her to take his name, without intending to marry her: And although an Englishman, after cohabiting with

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a woman in England, and allowing her to take his name, were to bring her down to Scotland, and conduct himself there in the manner already stated, this would not, in the opinion of this Respondent, in every case constitute a marriage. This, however, would be no exception to the general rule as already stated by this Respondent, but truly a judicious application of it to the circumstances of the case: The law, in all cases, not attending merely to the external act of cohabitation, but looking to that which is alone decisive, viz. the full and deliberate intention and consent of both parties to become man and wife, which may be inferred from cohabitation, but not necessarily, nor in all cases without exception.

14. To the fourteenth of said additional Interrogatories this Respondent answereth and saith, That a promise of marriage made in England, followed by a copula in Scotland, would, in this Respondent's opinion, be sufficient for obtaining a decree declaring the marriage in the Courts of Scotland, if the parties were to be found there.

15. To the fifteenth of the said additional Interrogatories this Respondent answereth and saith, That if a promise of marriage made in Scotland, were to be followed by a copula in England, this, if the parties were afterwards found in Scotland, would, in this Respondent's opinion, be sufficient for obtaining a decree in the Courts of Scotland.

16. To the sixteenth of the said additional Interrogatories this Respondent answereth and saith, That marriage by the Law of Scotland, being considered merely as a contract, and requiring only the deliberate consent of both parties for its completion, it would seem to be enough for obtaining a decree in the Courts of Scotland, that the parties had in any place, or at any time, expressed their deliberate consent, *de præsenti*, to be married. It is a different question, however, whether in the circumstances here stated, as well as in those mentioned in the two preceding Interrogatories, the Courts of England, or any other foreign country, where marriage is not completed by consent merely, but in general requires some formal celebration, would so far yield to the Law of Scotland as to give the same decision.

17. To the seventeenth of said additional Interrogatories this Respondent answereth and saith, That in the case here mentioned, as the letters written by the Englishman would not *per se* constitute marriage, but would in general require to be confirmed by letters of the same kind written by the woman in Scotland, the

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agreement could not be considered as mutual, till the last mentioned letters were received, and consequently, it would seem that the marriage could not be said to have been contracted in Scotland. In such a case, however, it appears to this Respondent that the Courts in Scotland, without regarding the *locus contractûs* would find the marriage binding, if the question could be effectually tried there.

18, 19, 20. To the eighteenth, nineteenth, and twentieth of the said additional Interrogatories this Respondent answereth and saith, That in general where there is only an obligation to marry, the parties may retract without being liable in damages: And where damages are due, it is not in consequence of the obligation to marry, but either from the manner in which the treaty has been broken off, as where it is attended with circumstances in some degree injurious to one of the parties, (see the case of Johnson against Paisley, 21st December 1770,) or where, in contemplation of the marriage, expences have been incurred.

21. To the twenty-first of said additional Interrogatories this Respondent answereth and saith, That the law being now fixed, it does not appear to be of importance to discover the grounds on which it was at first established, although this Respondent has no doubt that they are nearly as stated by Mr. Erskine: and that in this, as well as in many other cases, the law presumes the parties to have intended that which in the circumstances of the case was proper and becoming, and at the same time deducible from their actings; or, in other words, the law, in such cases justly holds, that persons having formed a connection, the object of which was marriage, would not proceed to consummate unless with the same view.

22. To the twenty-second of said additional Interrogatories this Respondent answereth and saith, That the presumption here mentioned cannot be said to be a *præsumptio juris et de jure*, because it might, in this Respondent's opinion, in certain circumstances be obviated by contrary evidence, *e. g.* if the man and woman were, previously to the copula, to interchange written declarations of their having determined not to marry each other. But it is a presumption of law so strongly established, as not to be obviated unless by evidence of the nature here suggested.

23. To the twenty-third of said additional Interogatories, this Respondent answereth and saith, That a promise of marriage followed by a copula, appears to this Respondent to constitute marriage upon both parties equally and in general, as the Respondent

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dent has formerly deposed, the obligations of the parties must be mutual or none at all.

24. To the twenty-fourth of said additional Interrogatories this Respondent answereth and saith, That he has already stated his opinion as to the decision in the case of Pennycook; and, as to the authority of Lord Stair, and the respect that is due to the different editions of his Institutes, this Respondent although greatly doubting the propriety of this Interrogatory, (as well as of some of the preceding ones) saith, that Lord Stair has been always considered as a writer of great authority in Scotland; it is to be observed however that the different parts of his Institutes were composed and published at different periods, and the fourth book was not printed till long after the other three; Lord Stair too being actively engaged in the political world as well as in the line of his profession, could not bestow that attention upon his publications, or in revising them, that was necessary for rendering them perfectly correct in all respects; and the manuscripts from which the different editions have been made out, appear to differ in some instances from each other; nor is there any edition so correct and authentic, as to prove to a certainty what his lordship's opinion was, although that published in 1759, chiefly by the care of the late Sir William Pulteney, is deemed far preferable to the rest.

25. To the twenty-fifth of said additional Interogatories this Respondent answereth and saith, That the common stile of a contract of mariage in Scotland may, at first sight, appear to import a consent to marriage *de præsenti*, the parties declaring their acceptance of each other for lawful spouses, or using words to that effect; but these expressions are uniformly held, in the practice of Scotland, not to constitute marriage, but espousals only, or sponsalia, as known in the civil law. The passages of the exhibits formerly referred to by this Respondent, are in his opinion, conceived in different and stronger terms, denoting that the Plaintiff and Defendant were "man and wife;" and in the manner and to the extent already stated by this Respondent, must, in this Respondent's opinion, be held to constitute a valid marriage.

26. To twenty-sixth of said additional Interrogatories this Respondent answereth and saith, That what has been said by him in answer to the immediately preceding Interrogatory, appears to be a sufficient answer to this one also.

27. To the twenty-seventh of the said additional Interrogato-

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ries this Respondent answereth and saith, That this Interrogatory appears also to be already answered by this Respondent, when examined in chief.

28. To the twenty-eighth of the said additional Interrogatories this Respondent answereth and saith, That this Interrogatory appears also to be already answered, unless so far as it has been asked, what would have been the Defendant's remedy if the Plaintiff had destroyed the exhibits? to which this Respondent answereth and saith, That in the case here supposed, the Defendant's remedy would have been the same as in the case of a marriage ascertained by a regular certificate of a clergyman, or justice of the peace, but which certificate has been afterwards destroyed by one or other of the parties; the parties desirous of having the marriage fulfilled, suffering in both cases from want of proof, and not from any defect of right. In both cases, however, the writings so destroyed migbt he restored by the remedy of an action for proving the tenor of their contents, and the manner of their being destroyed could be satisfactorily established.

29. To the twenty-ninth of said additional Interrogatories this Respondent answereth and saith, That he does not know of any case before that of M'Adam, in which it was *in terminis* decided that a mere declaration of consent to marry *per verba de præsenti*, was sufficient to constitute marriage *rebus integris*: but the proposition appears, to this Respondent, to be established by the general and concurring opinion of all the accredited writers on the Scot's law; and where the declaration is not to be proved by witnesses, but by written evidence, it appears to this Respondent to be incontrovertible. In the case of M'Adam, the difficulty appears to have arisen, not so much from any doubt as to the principle here laid down, but from the particular circumstances of the case, the parties having previously lived in a state of concubinage, and the declaration by Mr. M'Adam given in a very abrupt manner, and immediately followed by his death by suicide.

30. To the thirtieth of said additional Interrogatories this Respondent answereth and saith, That he has already mentioned the effect of contracts of marriage, to be different from that which is stated in the beginning of the Interrogatory. The effect of a contract of marriage, when followed by a copula, is to make the parties husband and wife in the same manner as a promise of marriage followed by a copula; the only difference being, that in the former case, the promise is proved by a formal writing,

whereas,

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whereas, in the other case, it may be proved either by other not so formal writings, or by the oath of party, or by acts and deeds inferring an engagement to marry.

31. To the thirty-first of the said additional Interrogatories this Respondent answereth and saith, That it has been generally held, since the decision in the case of Campbell, that those circumstances which would be deemed sufficient to constitute a marriage, in a question between a man and a woman, having exchanged a promise of marriage, and afterwards known each other carnally, might not be sustained to the same effect, where the question arose between one of the parties and a third person, who, in consequence of a studied concealment of the connection, had been led to enter into a formal and regular marriage. One reason for this, is to be found in the impropriety of concealing such an engagement, by which third parties may suffer an irretrievable injury; but another reason, and one more consistent with the law of Scotland with regard to marriage, appears to be, that in the case of marriages not regularly celebrated, but to be gathered from the words or actings of the parties, every circumstance of their conduct is to be duly weighed, in order to ascertain whether a deliberate promise or consent was given, and whether, in the opinion and intention of the parties themselves, the irrevocable union of marriage had been formed. In this view the concealment of the connection, especially when continued for a great length of time, and in circumstances where the party was called upon to avow the marriage if it had truly taken place, must go far to show that there was no marriage, nor a serious intention to marry in any of the parties.

ROBERT CRAIGIE.

The same Witness examined on the further additional Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said further additional Interrogatories this Respondent answereth and saith, That he had formerly adverted to the case here noticed, which, after the date of the report by Falconer, underwent a full consideration in the House of Lords, and afterwards in the Consistorial Court of Scotland, having been finally decided on the 29th June 1751; and having also more largely adverted to the Decision in his answer to the thirty-first ad-

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additional Interrogatory, he thinks it only necessary to add, that supposing the evidence of the marriage in this case to depend upon the Exhibit, No. 10. and also supposing that the circumstances in the case of the Plaintiff, were in other respects similar to that of Cochrane, the decision in the case last mentioned would certainly be of importance, but to what extent it seems impossible at this time to say.

2, 3. To the second and third of the said further additional Interrogatories this Respondent answereth and saith, That the case of Kerr and Hyslop, as reported by Fountainhall, 15th July 1696, appears to this Respondent to be quite different from the present one, and in that of Castlelaw against Agnew, which is fully stated in the Printed Papers, in the case of Linnen against Hamilton, 19th December 1748, the judgment of the Commissaries, which was affirmed in the Court of Session, was, that the defender's oath did not prove a direct promise of marriage, previous to the connection acknowledged by him: and in the case of Linnen, where also there was a reference to oath, the defender was on similar grounds freed from the conclusions of the action instituted for establishing a marriage, but in a separate action subjected in damages, on account of his "having enticed and seduced the pursuer to yield to his embraces;" and none of the decisions, in this Respondent's opinion, prove that a serious promise of marriage, followed by a copula, was not then held in law as equivalent to marriage.

4. To the fourth of the said further additional Interrogatories this Respondent answereth and saith, That this Respondent has now and formerly read the passage referred to in Lord Kaimes' Elucidations, and has attended to what is there said upon the case of Pennycook; and although this Respondent holds that this Interrogatory is irregular, if not incompetent, he thinks it proper to say in explanation, that the publication here referred to, seems to have been meant by the author, not so much to point out what the law was, but what in his opinion it ought to be (see preface). And the observations on the subject of marriage, though plausible and ingenious, do not seem to be founded in the law of Scotland. There is no ground for saying that the priest's blessing is, or ever was, in Scotland (at least since the æra of the reformation in 1560) deemed indispensable, though it is the most regular mode of constituting marriage. The act of 1503 was intended to regulate the proceedings in the matter of Terce, by allowing a woman, who had been by common reputation held as a wife, to obtain possession,

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sion of the legal allowance out of the lands in which her reputed husband died infeoffed, until it was determined in the courts of law that the parties had not been married. The decisions mentioned by Balfour, and afterwards by Spottiswood, must have been attended with peculiar circumstances, and as stated by these writers, appear to be erroneous, and would not be repeated at this time. In the case of Craig, in 1628, it is probable the decree of the commissaries had been given in absence (by default), and therefore still subject to review; and the parties, as this Respondent thinks, must have considered it in that light. And the reasonings by Lord Kaimes, as to the effect of a promise of marriage, followed by a copula, appear to be quite inconclusive, and at this time would not be listened to. Indeed, although in some of the later adjudged cases, with regard to marriage, this publication has been referred to, this has been done very slightly, and it has been hardly, if ever, adverted to upon the bench; and although containing some information that is not to be found elsewhere, and much acute and plausible remark, it was never in this Respondent's opinion and belief, considered as of authority in the Courts of Scotland.

ROBERT CRAIGIE.

7th August 1809.

Repeated and acknowledged at Edinburgh, before me the undersigned
WM. COULTER, Lord Provost.

In the Presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the LIBEL and EXHIBITS given on behalf of Mrs. DALRYMPLE.

7th June 1809.

ROBERT HAMILTON, Esq. of the City of Edinburgh, Advocate, aged about forty-five years, a Witness, produced and sworn, deposes and says,

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THAT he has practised as an Advocate before the supreme Court of Session in Scotland, since 1788; and that he has held the situation of Professor of the Law of Nature and of Nations, in

in the University of Edinburgh, since 1796; and further to the eleventh article of the said Libel he deposes and says, that he has attentively perused and considered the several Exhibits annexed to the Libel, and that he is of opinion these exhibit and furnish ample grounds for establishing a marriage between the Parties in this Cause by the law of Scotland, and that such marriage is thereby established. That in giving this opinion, he takes it for truth, as averred in the Libel, that a copula or *concubitus* has taken place, and there appears indeed to be presumptive evidence of it, from certain expressions in the Defendant's letters (No. 4 and No. 7); holding this, therefore, to be a fact, there appear in this case to be two grounds which constitute a valid marriage by the law of Scotland: first, it appears from the Exhibits, No. 1 and No. 2, the last dated 28th May, 1804, that mutual promises of marriage were interchanged between the parties; that these were followed by *concubitus* or a copula, which, in the Deposer's opinion constitute a marriage by the law of Scotland. That this was the state of parties is confirmed by Mr. Dalrymple's letters, from No. 3 to No. 9 inclusive, the tenor and strain of which, and various expressions used therein, denote that Mr. Dalrymple conceived he had entered into the fixed relation of marriage with Miss Gordon: deposes, that besides the above, there is a second ground by which in the Deposer's opinion an effectual marriage betwixt these parties has been constituted according to the law of Scotland; by the annexed Exhibit, No. 10, dated 11th July, 1804, the Defendant declares and acknowledges Miss Gordon to be his lawful wife, and in this declaration Miss Gordon concurs by her engagement of the same date; and although she thereby promises that nothing but the greatest necessity shall force her to declare her marriage, that does not appear to the Deponent to weaken the case; the reason for concealing their marriage being, in his opinion, sufficiently accounted for by the subsequent letters No. 13, 14. and 15, from the Defendant to the Plaintiff; deposes, that the above written declaration of the parties, expressed in unequivocal terms, and it must be presumed deliberately made, in his opinion, independent of all other circumstances, constitutes an effectual marriage; for he holds, that according to the law of Scotland, a marriage is completely established where consent is deliberately given; more especially, when expressed in a written acknowledgment or declaration *per verba de præsenti*, bearing that the parties are *eo-ipso* husband and wife: the Deponent is of opinion, that such a declaration constitutes a marriage by the Scot's law; though there should

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should be no *concubitus*; but that point does not here come into question, as he holds, according to the statement in the case, that *concubitus* or a copula has taken place. And he must further observe, that the constitution of a marriage betwixt these parties as above mentioned, is confirmed by various expressions in the Defendant's letters to the Plaintiff, subsequent to his declaration, namely, Nos. 12, 13, 14, and 15; in which, besides addressing her as his wife, and subscribing himself as her husband, he expressly refers to the connection that has been established, pointing out at the same time the necessity that existed for its being concealed. Deposes that in giving this opinion he has paid attention to the writers upon this branch of the law, and to the various reported cases which are consequently well known. But his opinion upon this point has been much confirmed by a decision pronounced by the Court of Session, upon the 13th June 1792; Elizabeth Ritchie against James Wallace, which has not been reported. The Deponent was counsel in that case for Elizabeth Ritchie, and has recently refreshed his memory by perusing the printed pleadings now in his possession. The circumstances were shortly as follows; Elizabeth Ritchie became pregnant to Wallace, who, some months after, gave her an acknowledgment in his handwriting in these terms: "January, 1785, I, James Wallace, son to John Wallace, of Wallace Grove, do hereby acknowledge that you, Elisabeth Ritchie, daughter to Alexander Ritchie in Dumbrey, is my lawful wife; and will solemnize the marriage regularly between us in the terms of the rules of the church, as soon as convenient for us; and I am your loving husband, signed, James Wallace. To Elizabeth Ritchie. Witness, Janet Telfer." Wallace denied his ever having written this acknowledgment, but it appeared from various circumstances to be genuine: Elizabeth Ritchie founded on it as a declaration *de præsenti*, constituting a marriage, which conclusion, in point of law, Wallace controverted; but the Court, by a majority of six judges to three, as appears from the Deponent's notes upon the papers, sustained the sentence of the Commissaries, which had found the acknowledgment libelled upon, relevant to infer marriage betwixt the parties.

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The same Witness examined on the Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said Interrogatories this Respondent answereth and saith, that the law of marriage in Scotland has for a long period been clear and decidedly fixed. It is laid down by Lord Stair, (Edition 1681, pages 30 and 76, and Edition 1693 pages 25 and 424) that marriage consists in the present consent, whether that be by words expressly, or tacitly by cohabitation or acknowledgment, or by natural commixtion, where there has been a promise or espousals preceding; for therein is presumed a conjugal consent *de præsenti*. This was the law then, and the Deposer holds it to be the law at this day, and is of opinion that it has not been shaken or altered by any of the cases that have since occurred, such as those of M'Innes against Moore, White against Hepburn, Taylor against Kello, M'Laughlan against Dobson, or M'Gregor against Campbell, which were all involved in special circumstances; whilst, on the other hand, the law as laid down by Lord Stair and Erskine, Book 1st, Tit. 6, § 2, 3, 4, 5, has been recognized and confirmed by various cases; particularly by those of Inglis against Robertson in 1786, Ritchie against Wallace in 1792, of Edmonstone against Cochrane in 1804, and Walker against M'Adam in 1807.

2. To the second of the said Interrogatories this Respondent answereth and saith, that the Scots law of marriage is ascertained and rests, 1st, upon legal principles, in respect it is a consensual contract; 2dly, upon the authority of our law-writers, referred to; 3dly, upon the judgments pronounced by the Court; and it is upon these that the Respondent has formed and given his opinion.

3. To the third of the said Interrogatories this Respondent answereth and saith, that there certainly is a material difference betwixt an obligation or promise to marry, and an actual marriage; a promise of marriage, *rebus integris*, may be resiled from; but if followed by a copula or consummation, a marriage, as formerly mentioned, is thereby constituted.

4. To the fourth of the said Interrogatories this Respondent answereth and saith, that an irrevocable obligation, by which he understands a written promise to marry delivered to a woman, will not be in all cases binding upon or tie up the woman from marrying another man. In the event of such a promise, there is *rebus integris* no marriage, so that either party may draw back,

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leaving it to the party injured to seek such redress as the law will afford by an action for breach of promise.

5. To the fifth of the said Interrogatories this Respondent answereth and saith, that he conceives that a woman who has received such a promise, is entitled to call upon the man in the proper court, at any subsequent period, to fulfil it; but as such a promise, provided matters were entire, would not constitute a marriage, the man might draw back, leaving to the woman her action for breach of promise: circumstances might no doubt occur, which might take away the woman's right to demand the enforcement of the man's promise to marry, if, for instance, she was herself to marry another man, or if she was unequivocally to concur in, or consent to, the man's marrying another. This answer is given upon the supposition, that there has been a promise merely, but *de facto* no marriage; for if that promise has been followed by a copula, a marriage is thereby constituted, which no circumstances or length of time can annul; and which the woman, accordingly, may at any subsequent period demand to be declared in the proper court. If a man has made a promise, and is uncertain from the circumstances which have occurred whether or not he has involved himself in a marriage, his remedy is by an action of Jactitation of Marriage, or of "putting to silence," as we call it in the Consistorial Court, the result of which will decide whether he is bound or free.

6. To the sixth of the said Interrogatories this Respondent answereth and saith, that he is of opinion, that as a promise of marriage to a particular woman, followed by a copula, both events occurring in Scotland, constitutes a marriage by the law of Scotland, the man to whom these circumstances applied, must be held as married, in whatever country he may go to; and that he could not legally marry another woman in England or any where else. If such a man, from the woman's not insisting, was in dubiety as to the state he was in, his proper course would be to bring an action of putting to silence, as above mentioned.

7. To the seventh of the said Interrogatories this Respondent answereth and saith, that a declaration in writing, given by a man to a woman, that she is his lawful wife, is not merely an obligation to marry, but is, when attended with the woman's acceptance and consent *de præsenti*, the valid constitution of a marriage.

8. To the eighth of the said Interrogatories this Respondent answereth and saith, that in the case supposed of a copula or con-

consummation, either before or after such a declaration, a marriage, it is thought, would certainly be constituted, nor would the circumstances mentioned constitute an obligation only upon the man to complete the marriage.

9. To the ninth of the said Interrogatories this Respondent answereth and saith, that a declaration in writing, such as here supposed, constitutes, as already observed, a marriage, not merely an obligation to marry, and a correspondence such as is figured, as it would evince the understanding and belief of the parties, would confirm the idea as to the existence of a marriage between them.

10. To the tenth of the said Interrogatories this Respondent answereth and saith, that if the man or woman who had given and received a declaration of a marriage, should thereafter express doubts as to the validity of such a declaration to constitute a marriage, or fears of being deserted, such expressions would, no doubt, be taken into account in explaining the intention of the parties at the time the written declaration was made; but unless such expressions indicated and inferred that there had'been no marriage in view, intended, or entered into, so that the declared consent was thereby controverted and overruled, the Deponent is of opinion that the expression of such doubts or fears by either party, which might be the result of misconception, could not destroy the effect of an explicit acknowledgment or declaration of a marriage. But it is hardly possible to answer this query pointedly, or in more precise terms, unless the circumstances or expressions alluded to were more particularly detailed.

R. HAMILTON.

The same Witness examined on the additional Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said additional Interrogatories this Respondent answereth and saith, that he is of opinion that Sir Thomas Craig, lib. ii. dieg. 18. § 17, *et sequent.*, where he treats of legitimate and illegitimate children, has delivered substantially what he is bound to presume was the Law of Scotland, as to marriage, at the time he wrote; according to that author, it appears that the essentials of a marriage existed, provided *sponsalia*, or a promise, had preceded a *concubitus* or consummation. It has

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indeed been conjectured, from what Craig says of the case of Edward Younger, that such circumstances conferred only a right of action to have the marriage solemnized, and he accordingly mentions that to that effect the mother had prevailed before the commissaries; but it appears from what immediately follows, that though Younger had refused, these judges nevertheless held that there had been a valid marriage, and gave effect to it accordingly. This proceeding seems to be very little different from the present law and practice, where a marriage constituted by a promise and copula, requires, like other irregular and clandestine marriages, a declarator as judicial evidence of the fact. And whatever upon this point may have been Craig's idea, the Respondent is of opinion, that the Law of Scotland has for a long period acknowledged that a promise, followed by a copula, does not merely furnish grounds for enforcing marriage, but does actually constitute one. That Craig treats of other points, namely, what effect is to be given to a marriage while a prior one has been entered into and is subsisting, and gives his opinion that the *bona fides* of one of the parties, though not sufficient to confirm the marriage, will nevertheless be effectual to legitimate the offspring, though not so, if both parties are in the knowledge of the prior marriage; but the Respondent doubts very much, if children born in such circumstances could ever be regarded as legitimate, and is of opinion, that by the Law of Scotland, as it now stands, they would not. He further answereth, that Craig is not upon points of this nature of the highest authority in the law of Scotland; they are not those upon which he professedly treats, and his opinions have not the same weight as those of Lord Stair and other subsequent writers.

2. To the second of the said additional Interrogatories this Respondent answereth and saith, that the doctrine laid down by Lord Stair in the passages referred to in this query, must be presumed to have been agreeable to the Law of Scotland in 1693, when the edition referred to was published. That it is further upon the whole agreeable to the Law of Scotland as it stands now, except that it appears to be now more firmly established that a promise and subsequent copula constitute a valid marriage. That more particularly, and in answer to that part of the query, viz. if the Law of Scotland has changed since the time of Lord Stair, and if so, what has introduced such change? the Respondent answereth and saith, it appears to him, that with a very few exceptions of dubious import, the Law of Scotland, that a promise, followed by a copula, constitutes a marriage, has come to be

be permanently fixed and established. For it appears that both Sir John Nisbet, of Dirleton, who was advocate to King Charles the Second, and Sir James Stewart, who was advocate to King William and Queen Mary, were of opinion (*voce sponsalia*), that a promise, followed by *concubitus*, made an effectual marriage. Two cases are reported in the Dictionary of Decisions, vol. ii. page 288; the first, 19th July 1670, Cockburn, the second, 19th February 1732, Harvie, which seem to infer, that a promise of marriage and subsequent copula made an effectual marriage: the case, 15th July 1696, Hislop contra Kerr, reported by Fountainhall, and referred to in the case, 1st December 1749, Linning contra Hamilton, appears, no doubt, to be somewhat adverse to this doctrine; but the Respondent observes, that this was not an action for declaring a marriage, but for damages, and therefore he thinks it to be presumed, the woman Hislop was conscious that she could not establish such a promise of marriage as would enable her to prevail in an action of that nature, which idea is countenanced by the circumstances and opinions stated in the report. That this is not at any rate a decision, that a promise and subsequent copula did not constitute a marriage; and although it had, the Respondent does not think it could be held sufficient to over-rule the prior and subsequent adjudged cases and authorities. That the other case of Agnew, referred to in the decision of Linning contra Hamilton, instead of being adverse, seems to confirm this doctrine. That the Respondent has examined the printed pleadings in the case of Linning, (Sessions Papers, in Advocates Library, Kaimes' remarkable decisions, No. 100,) and from these it appears, that Castlelaw, the woman, insisted against Agnew for a marriage, and in support of it alleged a promise and subsequent copula: no doubt appears to have been entertained of the relevancy of these grounds, but she failed in the proof; for having referred the promise to Agnew himself, he swore negative, upon which the Commissaries found, "that the defender's oath does not prove a direct promise of marriage previous to the *concubitus*;" and therefore assoilzied from the process of adherence, &c. To this sentence the Court of Session, upon the 1st January, $17\frac{19}{20}$ adhered; so that foiled in her action for a marriage, she was contented to take, and Agnew to pay, damages. That the case of 1st December 1749, Linning contra Hamilton, and various other cases subsequent, appear to affirm the legal doctrine as to a promise and subsequent copula: The pursuer's action in that case, which was at first for a marriage, was chiefly founded upon the allegation of a promise of marriage

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followed by a copula; which infers, that such grounds were relevant: upon a reference to oath, the defender denied the promise, which ended the question of marriage, so that the pursuer proceeded in her action of damages. But if the promise had been proved *scripto vel juramento*, the Respondent has not a doubt that the pursuer Linning would have prevailed in establishing the marriage; that then came the case, Pennycook and Grinton contra Grinton and Graite, where the question was expressly decided; and the same doctrine is confirmed by the case, 26th November 1755, Smith contra Grierson, in the Faculty Collection, from the report of which it is clearly to be inferred, that a promise and copula sufficiently constituted a marriage by the Law of Scotland; the only legal point which occured being as to the mode in which the promise was to be proved, which it was found could be done only by the defender's writing or his oath. That the same doctrine seems to be taken for granted in the argument on the case, 20th December 1781, M'Innes contra More, where it is stated as one of the modes of constituting a marriage. It is likewise inferred in the case, 18th November 1785, White contra Hepburn; and in the case, 13th June 1792, Ritchie contra Wallace, referred to in the Respondent's deposition in chief; the Respondent observes, from the notes of the judges' opinions, that the late Lord Justice Clerk M'Queen stated a promise and copula as one of the modes of constituting a marriage. In the case of Kennedy contra M'Dowell, decided in 1800, but not reported, the pursuer's chief ground of action for establishing a marriage was a promise and subsequent copula: but though she failed in establishing these precise circumstances, and of consequence in making out her marriage, no doubt, the Respondent understands, was entertained by the Commissaries or the Court of Session, as to the relevancy of a promise and subsequent copula to constitute a marriage. That in the argument in the case, 15th May 1804, Edmonstone contra Cochrane, and in that of March 4th, 1807, Walker contra M'Adam, it is stated and avowed by both parties, that a promise and subsequent copula was one of the modes of constituting a marriage by the Law of Scotland. That these are the authorities which in the Respondent's opinion appear to have confirmed the Law of Marriage, as laid down by Lord Stair.

3. To the third of the said additional Interrogatories this Respondent answereth and saith, that he is of opinion, that the decision in the case of Pennycook contra Grinton, 15th December 1752, if an extension of the doctrine laid down by Sir Thomas

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Craig, was nevertheless agreeable to that laid down by Lord Stair, and to most, if not to all, of the previous authorities the Respondent is in the knowledge of, and which have been noticed above; it farther appears to him from the report, that this case was decided upon the general point, and that whether the woman, namely, Graite, had been in *bonâ fide* or not, that the decision would have been the same as was given, and her marriage consequently annulled.

4. To the fourth of the said additional Interrogatories this Respondent answereth and saith, that he has already mentioned the cases he is in knowledge of, which seem to apply to the present question, but others may have occured in the Commissary Court.

5, 6, 7. To the fifth, sixth, and seventh of the said additional Interrogatories this Respondent answereth and saith, that the Court of Session, is not, he conceives, bound by former decisions, if these are in principle iniquitous or unjust; if doubts are entertained of any point of law or decision, as to its being unsound or not to be followed as a precedent, the court is certainly at liberty to review it either by a hearing in presence, or in some such solemn manner, so as by a deliberate judgment to fix the point in future.

8, 9. To the eighth and ninth of the said additional Interrogatories this Respondent answereth and saith, that he is of opinion that the case of Grinton is one of authority, fixing the general point, as the report bears "that it was held for law, that a promise of marriage followed by a copula made from that moment an actual marriage." The principle there laid down appears moreover to be confirmed by the discussion that has occurred in the various cases already mentioned; and although the court might no doubt order a hearing in presence, for reviewing the principle of that decision, the Respondent would doubt very much, and would indeed have little expectation of its being altered.

10. To the tenth of the said additional Interrogatories this Respondent answereth and saith, that writings produced by a party asserting a marriage, though after the other party has intermarried with another, will, nevertheless, the Respondent conceives, receive such effect as is due to them upon their own merits.

11. To the eleventh of the said additional Interrogatories this Respondent answereth and saith, that he conceives that in the case supposed in this query, the pretensions of the party who had

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ostensibly intermarried with a person previously married, in consequence of a promise followed by a copula, would not be sustained, and of course, as the first would be a valid marriage, the second formed connection would not be regarded.

12. To the twelfth of the said additional Interrogatories this Respondent answereth and saith, that he conceives that the Defendant being a domiciled Englishman in Scotland upon military service, did not impede his contracting, while in Scotland, a valid marriage by the law of Scotland, and if he contracted such a marriage in Scotland, either by mutual declaration *de præsenti*, or by a promise and subsequent copula, his publicly marrying Miss Manners in England, before the present action was instituted, can have no effect upon the validity of his previous marriage.

13. To the thirteenth of the said additional Interrogatories this Respondent answereth and saith, that officers on military service in Scotland, though in relation to questions of succession they may be held domiciled Englishmen, may, without any solemnization or contract of marriage, form connections with women which will be a marriage, namely, by declarations of marriage *de præsenti*, by a promise and subsequent copula, and by the other modes in which an irregular marriage in Scotland is constituted.

14, 15, 16. To the fourteenth, fifteenth, and sixteenth of the said additional Interrogatories this Respondent answereth and saith, that as the cases pointed out in these Interrogatories have not, so far as the Respondent knows, ever occurred or been decided, he cannot venture to give a positive opinion upon them; if the parties were domiciled in Scotland, he is inclined to think that in either case supposed a marriage would be constituted. But he entertains great doubts and uncertainty as to what might be the result, if the parties were in no respect subjected to Scottish domiciliation.

17. To the seventeenth of the said additional Interrogatories this Respondent answereth and saith, that letters by a domiciled Englishman in England, to a woman in Scotland, expressing consent to a marriage *de præsenti*, would not, the Respondent apprehends, be sufficient to constitute a marriage by the Scots law, but that such letters would assuredly be taken into account as evidence of a marriage asserted to be contracted in Scotland.

18. To the eighteenth of the said additional Interrogatories this Respondent answereth and saith, that he is not aware of any distinction

distinction in the law of Scotland between a marriage actually constituted, and a promise of marriage followed by a copula, which he conceives to be the import of this query, in relation to "an obligation to marry which cannot be retracted in respect that *res non sunt integræ*," these last circumstances, as already so often mentioned, constitute a valid marriage, awaiting, like all other irregular and clandestine marriages, a declaratory sentence of the Consistorial Court, (but with retrospective operation,) as the appropriate judicial evidence to the effect. That the Respondent therefore thinks that all such irregular and clandestine marriages stand upon an equal footing, and that in relation to them, there is no obligation of an intermediate class, leaving both parties at liberty to contract another marriage, and that such intermediate obligation is referable only to a promise of marriage without a copula, which *rebus integris* may be resiled from.

19. To the nineteenth of the said additional Interrogatories this Respondent answereth and saith, that he conceives that by the law of Scotland, an obligation or promise to marry may be retracted or departed from, *rebus integris*, as already noticed, leaving to the party injured their action of damages. That he does not understand, that by the law of Scotland, damages in such cases would be allowed abstractly for the breach of promise and consequent affront; but if the party injured, can shew actual loss or damage incurred in consequence of the retraction of a promise, a compensation upon that account will be allowed.

20. To the twentieth of the said additional Interrogatories this Respondent answereth and saith, that it appears to be anticipated, the Respondent having given his opinion, that where a promise of marriage has been made and a copula has followed, a marriage is thereby constituted; so that in the event of retracting, payment of damages will not suffice.

21. To the twenty-first of the said additional Interrogatories this Respondent answereth and saith, that he is of opinion, that in holding a promise and subsequent copula to be the constitution of a marriage by the law of Scotland, the equitable and moral principle is taken deeply into account; but he does not imagine that this is the only ground for holding that these circumstances constitute a marriage; that the inferred consent never is, he conceives, to be lost sight of: and it appears to him, that Mr. Erskine in the passage referred to, b. i. t. vi. s. 4. though he does not state the law of marriage so fully as might be, yet, nevertheless states it with truth and correctly.

22. To

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22. To the twenty-second of the said additional Interrogatories this Respondent answereth and saith, that if a promise of marriage has been legally proved, *scripto vel juramento*, and a copula has followed, the Respondent is not aware of any means by which the essentials thereby established in constituting a marriage (whether it is the presumed consent *de præsenti*, or the moral principle that is considered) can be rebutted; if these facts are proved, a marriage is fixed; so that there is in his opinion an end of the question.

23. To the twenty-third of said additional Interrogatories this Respondent answereth and saith, that where a woman has given a promise of marriage, and a copula has followed, and the man alleges a marriage, and of consequence a consent upon his part, *eo momento* a marriage, the Respondent thinks, is established: but if it is the woman who alleges a marriage, there will be this defect in the case supposed to constitute a marriage, namely, that the man has not promised or consented: and in these circumstances it is accordingly thought, that as there would be a lack of mutual consent to marry, there would of course be no marriage. That the Respondent must however observe, that as he does not know of any such case having been decided, he gives this opinion with caution; and it at the same time appears to him, that the discussion of these hypothetical cases, evinces, that the consent of parties is in all these and similar circumstances one of the main and ruling principles for deciding a question of marriage.

24. To the twenty-fourth of the said additional Interrogatories this Respondent answereth and saith, that he is of opinion that this doctrine, as to the constitution of marriage, is not radically contradictory to the substance of the doctrine stated by Sir Thomas Craig. If there is any difference, it rests not upon the essentials in the constitution of a marriage, but in the form merely of declaring it, and whether or not a previous action is necessary. But the doctrine stated, is, the Respondent conceives, agreeable to the authority of Lord Stair, which is justly considered as of great weight in the law of Scotland. The work of that author does perhaps contain some errors, but it is more to be depended on than that of any other; and if there is any omission in the passages in his work, relative to the law of marriage referred to, it is, in not adverting to the moral principle assuredly to be taken into account, in judging of, and holding a promise and subsequent copula to be the constitution of a valid marriage. Lord Stair, it is true, does not refer to any case in support of the above position, excepting that of Younger be considered as one, (vide edition

1693,

1693, page 426.) But the Respondent conceives that his opinion is sanctioned by the soundness and equity of the principle, and the analogy which the case bears to the constitution of a marriage by mutual consent *de præsenti,* and independent of these views, Lord Stair probably had the Canon Law in his eye, by the *decretalia Gregorii* of which, lib. 4. tit. 1. cap. 30, it is said, "*is qui fidem dedit mulieri super matrimonio contrahendo carnali copulâ subsecutâ, si in facie ecclesiæ ducat aliam et cognoscat, ad primam redire tenetur, etc.* The opinion of this author is accordingly entitled to much consideration, and no doubt, it is conceived, can be entertained of the fidelity with which that opinion has been transmitted, as it is contained in the two first editions of his work, both of which were printed in his own lifetime: the second in 1693, professing to be a correction of the first, in 1681, by his Lordship himself.

25, 26. To the twenty-fifth and twenty-sixth of the said additional Interrogatories this Respondent answereth and saith, that contracts of marriage entered into in Scotland bear in general, and it is probable uniformly, that the parties accept of each other for their lawful spouses, or, as Dallas has it, page 724, *et sequen.* for their lawful future spouses; importing thereby consent *de præsenti:* but then these contracts further bear, that the parties are to solemnize such marriage in the face of the church, and thence it is held, Erskine, p. 90, that such contracts do not constitute a marriage, but may be resiled from, leaving to the party their action of damages for any loss that may have been sustained in consequence thereof. Such contracts are usually subscribed in presence of the relations of the party, who most frequently also subscribe it as witnesses; but they are entirely different and altogether distinct from the exhibits annexed to the present case, which, in the Respondent's opinion, constitute a clandestine though an efficient marriage, excluding in their intention such formal preliminary which is of a public nature, and in like manner all ceremonies and solemnities in the face of the church: as such declarations constitute, as the Respondent conceives, an effectual marriage *instanter,* they cannot be retracted, and much less so, if, as is stated to be the fact in the present instance, there has been a copula or concubitus.

27. To the twenty-seventh of the said additional Interrogatories this Respondent answereth and saith, that he is of opinion that in consequence of the exhibits annexed to the libel, namely, the promise to marry and the mutual declarations of marriage *de præsenti,* which were given, and if it be the fact, as is affirmed, that

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that concubitus followed, neither of the parties could retract or free themselves from a marriage, independent altogether of any actual celebration of it,

28. To the twenty-eighth of the said additional Interrogatories this Respondent answereth and saith, that he is further of opinion, that by these exhibits and the alleged copula, (which if it is denied must be proved) the Plaintiff was bound to the Defendant in a valid marriage; it was consequently in his power to claim her as his wife, and to require her adherence; and in the event that the Plaintiff had destroyed the exhibits in her possession, if the Defendant had in his possession a duplicate of the mutual declaration, that would be sufficient to prove and constitute the marriage; and if he had not such duplicate, he would have been entitled to her oath as to the prior existence of such exhibits, and to the import of them whether they did not contain a promise of marriage and declaration *de præsenti* of such an engagement: either of which being established in the affirmative, would, in like manner as now that they are in existence, constitute a marriage,

29. To the twenty-ninth of the said additional Interrogatories this Respondent answereth and saith, that he has either now or formerly noticed all the cases appearing to be material and applicable upon the law of marriage, which he is acquainted with. In the case of Ritchie contra Wallace, in 1692, which was decided upon a declaration *de præsenti*, matters were in certain respects entire, the copula having preceded the acknowledgment; but this circumstance was not held as altering the case, or as diverging it from the rule of law that the mutual consent of parties declared *de præsenti*, constituted a marriage.

30, 31. To the thirtieth and thirty-first of the said additional Interrogatories this Respondent answereth and saith, that if parties were to enter into a contract of marriage, and a copula or concubitus was thereafter to take place, so that matters were not entire, a marriage it is thought would be constituted, in like manner as in the case where there had been a promise and subsequent copula; and as a valid marriage would in these circumstances be constituted, so the Respondent does not imagine that any subsequent connection of that nature, which the man might attempt to form, could have the result of an effectual marriage. That the woman clandestinely married might be highly to blame in concealing or seemingly foregoing her right, but that conduct could not justify or excuse the man, or place him absolutely in *bonâ fide* to contract a second marriage; nothing could place him in security, and consequently in *bonâ fide*, but a decree of putting

to

to silence in an action of jactitation of marriage; and although a grievous misfortune might thus fall upon an innocent woman who had been ensnared by the falsehood of the man, no feeling for her mischance can, in the Respondent's opinion, be set up to overturn a marriage previously constituted, and to bastardize the issue, if any, in favour of what was from the first, in consequence of the man's incapacity to contract, a legal marriage, nothing more, however much the injured female might deserve commiseration, than an illicit connection.

R. HAMILTON.

The same Witness examined on the further additional Interrogatories, given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. TO the first of the said further additional Interrogatories this Respondent answereth and saith, that he has paid particular attention to the case reported by Falconer, 28th July 1747, Campbell contra Cochrane, and to the ultimate result in that case subsequent to the point reported. The point adjudged by the Court of Session is thus noticed by Falconer in his Index, *voce—Fraud* :—" A woman alleging a private marriage with a person deceased, who during his life had lived publicly with another in her sight, was repelled *personali exceptione* from proving her marriage to the prejudice of the other and her issue." The Court of Session, by Interlocutor of the 28th July 1747, remitted with an instruction to the Commissaries "to find that Mrs. Kennedy was barred *personali exceptione* from being admitted to prove that she was married to M. Campbell, of Carrick, before he was married to Mrs. Jean Campbell;" so that the sentence of the Commissaries who had allowed Mrs. Kennedy to prove her marriage was altered; but this point was appealed to the House of Lords, and upon 6th February 1748, the Interlocutor of the Court of Session was reversed, and that of the Commissaries, which had allowed a proof, sustained: that the Deposer has found this to be the fact from the appeal cases of these parties appointed to be heard in March 1752. It is indeed said in the case of Mrs. Jean Campbell, that the Interlocutors complained of were reversed by consent of her counsel, but it is however certain that the question returned to the Court of Session and the Commissaries, when the Interlocutor allowing Magdalene Cochrane or Kennedy a proof of her marriage,

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marriage, was followed out, a proof accordingly taken, and upon the 25th January 1751, the Commissaries found that Mrs. Magdalene Cochrane had not proved her prior marriage libelled, and therefore dismissed her process, and found in favour of the marriage of Mrs. Jean Campbell and the legitimacy of her daughter. This sentence was also submitted to the Court of Session, and thereafter was appealed to the House of Lords, and was affirmed. That in adverting therefore to this case, it must be remembered that the point reported by Falconer, namely, that Mrs. Cochrane was barred *personali exceptione* did not ultimately stand, she being allowed to prove her marriage; and this, the Deposer conceives, is agreeable to the law of Scotland as it now stands. Mrs. Cochrane, as the Commissaries found, did not prove her prior marriage, and though the circumstances in which she was placed appear from the appeal cases referred to to have been extremely hard, those on the other hand which in the Respondent's apprehension were the most adverse to her, (supposing they are correctly stated in the cases) were that Mrs. Cochrane had by her conduct upon different occasions several years subsequent to her alleged marriage treated Mrs. Jean Campbell as Captain Campbell's wife, thereby acknowledging her as such. That the Respondent is aware that this fact might have had much weight in the comparative estimation of the proof brought by the parties, in so far as it might perhaps from thence be inferred, that such conduct betrayed a consciousness upon Mrs. Cochrane's part that she was not Captain Campbell's wife. The Respondent conceives that the decision upon the first point in the above case is so far applicable to the present one, that the Plaintiff is not barred *personali exceptione* from proving her alleged prior marriage with the Defendant: but it is impossible for him to say, whether the decision upon the second point in the above case is in any respect applicable to the present question, as he is not put in possession of all the circumstances that may have taken place between the Plaintiff and Defendant subsequent to her alleged marriage, and in particular, he does not know whether or not she has acknowledged Miss Manners as the Defendant's wife.

2, 3. To the second and third of the said further additional Interrogatories this Respondent answereth and saith, that as he has adverted to the cases referred to in his answer to the second of the additional Interrogatories, it is only necessary to observe further, that these cases do not, in his opinion, prove that either in the year 1696 or 1749, a marriage resting upon a promise and

and subsequent copula could be defeated by another marriage entered into by the man as a *medium impedimentum*; and it further appears to him, that the decision upon the first point in the case of Campbell contra Cochrane, is adverse to that doctrine.

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4. To the fourth of the said further additional Interrogatories this Respondent answereth and saith, that he is well acquainted with this article of Lord Kaimes's Elucidations, but though it is like all that author's writings, an ingenious argument, it is in some places incorrect; particularly where he says, that a low woman may succeed in proving a promise *cum copula*, by witnesses of her own rank, which is not the law, as his Lordship may have known from the case, 26th Nov. 1755, Smith contra Grierson. That it is impossible for the Respondent to say whether the circumstance of the subsequent marriage with Graite being a clandestine one, had, as Lord Kaimes insinuates, weight with the judges; nothing of that kind appears from the report, which, as already mentioned, bears, that the case was taken up entirely upon the general point: and as the Respondent holds it to be fixed law, that a promise and subsequent copula constitute a marriage, he does not think that Lord Kaimes' argument in a case similar to that of Grinton would be successful.

R. HAMILTON.

15 August 1809.

Repeated and acknowledged at Edinburgh, before me the undersigned
Wm. Coulter, Lord Provost.

In the presence of me, Harry Davidson,
Not. Pub. and Actuary Assumed.

On the Libel and Exhibits given on behalf of Mrs. Dalrymple.

7th June 1809.

DAVID HUME, ESQ.

DAVID HUME, Esq. of the City of Edinburgh, Advocate, aged fifty-two years, a Witness, produced and sworn, deposes and says, that he has practised as an Advocate before the Supreme Court of Session in Scotland since 1780, and that he has occupied the Chair of Professor of Scots Law, and read lectures as such in the

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the University of Edinburgh since December 1786; and further to the eleventh article of the said Libel he deposes and says, that he has attentively perused and considered the several Exhibits annexed to the Libel, and that in the law of Scotland marriage is considered as an ordinary civil contract which is completed by the interposition of the consent of parties, provided this take place unequivocally, seriously, and deliberately, and with a genuine purpose immediately to establish the relation of husband and wife, and not to engage only, or betroth themselves to marry, at some future time. That a marriage may thus be effectually made in Scotland, without the form of celebration by a clergyman, and without the use of any precise ceremony or solemnity even of a civil nature, and in any way wherein the explicit and mature consent of parties is gravely exchanged. That with respect to the evidence of the proper matrimonial consent having passed between the parties, the practice of the law of Scotland is not limited by strict or scrupulous rules, but allows the fact to be vouched or inferred in sundry modes of evidence, by public cohabitation, under the character, or as it is termed the habit and repute, of man and wife: by writings of mutual acceptance as spouses *de præsenti*, by mutual written declarations or acknowledgments of marriage, by a series of letters, such as in their contents and mode of address and subscription either express or virtually imply an acknowledgment of marriage; by verbal declaration also before a magistrate, or made on some suitable and serious occasion before creditable witnesses called by the parties for that purpose. That whether the writings executed by the parties are in the form of mutual and present acceptance of each other as spouses, or in that of a declaration of marriage as already made, is no wise material; for still such writings are evidence under the hand of parties, and to each against the other, that the just matrimonial consent has passed between them in substance though not in form: the voluntary execution of such declarations is a virtual consent of the parties as at that date to stand in the relation of married persons. That more especially, regard is paid to declarations or acknowledgements of marriage whether oral or written, where it appears that they have been followed with or accompanied by the parties' carnal knowledge of each other: not that such intercourse is regarded as the seal or accomplishment of the contract or indispensible to its validity, but as a material ingredient of evidence to shew that it was meant and understood between the parties, that they were actually man and wife from that time, and not engaged or under promise only. That it is however

however carefully to be observed with respect to all these several modes of evidence, whether oral or written, that they are liable to be controuled and expounded by other writings, if such there be, of a contrary import, which have passed between the parties, or by facts and circumstances of a different tendency in the after conduct and proceedings of parties, whereby it becomes necessary for the judge to take a complex view of the whole case, and to determine on the whole series of evidence and circumstances, whether by the writings and acknowledgements which passed between the parties, they did or did not truly intend to become man and wife, and did or did not consider themselves as being in that relation to each other. That among other circumstances, which weigh in this point of view, the absence of carnal intercourse, is always one of some moment; but that although unfavourable to the plea of marriage, this circumstance, in the Deponent's opinion, is not of itself decisive, but may be made amends for by the other evidence in the case, and more especially where reasonable motives of prudence or the like can be assigned for such forbearance. That in illustration of the general principle above-mentioned, the Deponent may take notice of the following judgments which appear in the printed collections of reports, the case of Inglis and Robertson, 3d March 1786, the case of Edmonstone contra Cochrane, 15th May 1804, and the case of M'Adam contra M'Adam, 4th March 1807, whereof the last was a case of mere verbal declaration; and that the Deponent has had occasion to observe sundry other judgments to the same effect, which have not been reported: the case of Peggy Ferguson contra David M'Kie, (2d August 1781,) being a case of verbal declaration, that of Elizabeth Richardson contra John Irving, (3d August 1785,) that of Elizabeth Ritchie contra James Wallace, (13th June 1792,) and that of Sibella Atkinson contra John Brown, (6th July 1787,) being three cases of written declaration. That the Deponent does not consider the judgment of the House of Lords in the case of More and M'Innes, (25th June 1781,) nor the judgment of that House in the case of Taylor and Kello, (16th Feb. 1787,) as in anywise to the impeachment of the leading principle of the law of Scotland respecting the constitution of marriage, for in both instances the judgment of the House of Lords is expressed in cautious and detailed terms, such as save the principle, and rest the decision on the particular circumstances of these cases, as yielding evidence in the case of More, that his declaration was meant as a blind only to the world to protect the woman during her pregnancy; and in Taylor and Kello's case that the

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the writings were not intended by either party, or understood by the other as a final agreement. That the Deponent regards in the same light the case of M'Laughlane and Dobson, 6th December 1796, where the conduct of parties had been variable and contradictory, and no carnal intercourse had taken place: deposes, that, by the law of Scotland, marriage may also be effectually contracted by means of a mere promise of marriage *subsequente copulâ*, the law presuming, in these circumstances, (such is the language of systematic authors and recognized in practice) that the carnal intercourse is accompanied with the exchange of the proper matrimonial consent *de præsenti*, and takes place in reliance on it. That agreeably to this principle the effect of copula following on a promise is not merely to bind the promise and beget an effectual obligation to marry, but to make an actual marriage from the time of the copula, to the effect of disabling both parties from contracting any other marriage; and that in the case of Pennycook contra Grinton and Graite, (15th Dec. 1752,) a marriage celebrated by a clergyman and followed with procreation of a child, was annulled accordingly in respect of the man's prior marriage to another woman, the pursuer, which was constituted by promise and copula only; that applying these principles to the present case the Deponent is of opinion that the mutual acknowledgment of marriage in the Exhibit, No. 2, and the renewed acknowledgment in the Exhibit, No. 10, accompanied with carnal intercourse between the parties proved or admitted, and the various acknowledgments express and implied in the Defendant's several letters, the other twelve Exhibits, do constitute a valid and effectual marriage by the law of Scotland. The said Exhibits, No. 2 and No. 10, being evidence under the hand of the parties, and to each against the other, that the proper matrimonial consent making them immediately man and wife, had passed between them; and these writings being themselves virtually and in substance the exchange of such consent *de præsenti*. That the Deponent does not discover any sufficient grounds for considering the said declarations, No. 2 and No. 10, otherwise than as serious and deliberate, and intended immediately to establish the relation of husband and wife between the parties; and more especially this purpose and understanding of the parties may be inferred from the circumstances, if proved or admitted, of carnal intercourse having taken place in pursuance of those declarations; and further, that the series of letters from the Defendant bearing repeated and strong acknowledgments of marriage, both express and implied, mark a settled resolution and habit of mind on the

subject,

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subject, and not a transient or wavering purpose only; that the Deponent observes that in some of the letters, especially in Nos. 5 and 6, some expressions are interspersed which may seem to savour, in some measure, of an understanding on the Defendant's part, that he was under promise or engagement only, but these are outweighed by earnest and more pointed contrary declarations in the same and other letters, and more especially by very serious ones, in Nos. 13 and 14; and further, that these loose and equivocal words seem to relate to the Defendant's promises and engagements to make a public acknowledgement of his marriage as soon as might be, and are also probably accounted for on this footing that the marriage was private, and the documents of it under the power of the Plaintiff, and that the parties were imperfectly instructed in the law of the case, so as not to know whether it might not be possible to dissolve and undo the connection by mutual consent, or by the Plaintiff's destroying the written evidence of it in her possession. But that on the whole series and contents of the letters, they do appear to the Deponent not to invalidate or counteract the Declarations, No. 2. and No. 10, but rather to vouch the Defendant's understanding that he was irrevocably married thereby, and his consent so to be, if the law permitted it to be done in that fashion. That the Deponent however thinks it proper to add, that if a process of declarator of marriage at the Plaintiff's instance, and grounded on these several documents, were depending in the Consistorial Court of Scotland, or in the Court of Session there, the course of proceeding would be to compel the Defendant, Dalrymple the husband, to produce the letters by him received from the Plaintiff in return, and if such letters were produced and were found to contain assertions on her part of her freedom from the matrimonial tie, and an explanation of her understanding of the mutual acknowledgements of parties as having always been to promise and contract *de futuro* only — this might be sufficient to apply and expound these acknowledgments accordingly. That, on the other hand, if the Defendant being called on to produce the Plaintiff's letters, upon oath denied his receipt or possession of any such, or alleged that he had lost or destroyed them, the case would then be determined on the documents exhibited for the pursuer. Further this Deponent deposes and says, that the mutual promise of marriage contained in the Exhibit, No. 1. being *de futuro* only, is not of itself sufficient to make a marriage by the law of Scotland, or even to beget a valid obligation to marry; but that the said

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written promise, followed with carnal copula, proved or admitted, is sufficient in the law of Scotland to constitute a valid marriage from the date of such copula, so as effectually to disable both parties from contracting any other marriage, and this independently of the effect of the said Exhibits, No. 2. and No. 10, as an exchange or an evidence of the proper and present matrimonial consent. That the said Exhibits, No. 2. and No. 10, supposing them not sufficient documents of an immediate marriage, are however certainly at least equivalent to a renewed promise of marriage, and if followed either of them with copula proved or admitted, do in like manner constitute a marriage, independently of the promise, No. 1.

DAVID HUME.

The same Witness examined on the Interrogatories given on behalf of John William Henry Dalrymple, Esq. the other Party in this Cause.

1. To the first of the said Interrogatories this Respondent answereth and saith, that he considers the constitution of marriage by the consent of parties seriously and *de præsenti* interposed, as a genuine article of the common Law of Scotland, from the period at least of the Reformation, and that he is not acquainted with any evidence of the priest's blessing having been reckoned indispensable in Scotland (though it was regular and laudable) even in the Catholic times. That the only variation of practice the Deponent knows of, is, that for the last twenty years, or thereby, there has been somewhat a greater readiness in the Court to admit evidence in controul or explanation of the written declarations of parties.

2. To the second of the said Interrogatories this Respondent answereth and saith, that the law on this head is to be collected from the works of those authors who have written concerning the Law of Scotland, and from the decisions of the Court of Session, and of the House of Lords, in cases of marriage; and that the Deponent has formed his own opinion on these grounds accordingly.

3. To the third of the said Interrogatories this Respondent answereth and saith, that no such thing is recognized in the Law of Scotland, as an irrevocable obligation to marry:

that

that to be at all available, the consent to marry must be *de præsenti*, and the most solemn promise of marriage *de futuro* under the hand even of the party, not only is not effectual to compel solemnization of marriage, or to authorize a decree of declarator of marriage in case of refusal to solemnize, but is not even a ground of action of damage *in solatium* of the disappointment, though it may ground a decree for such actual and patrimonial damage, (the expence, for instance, of wedding-clothes, and the like,) as the complainer can shew in the case. That though parties are thus at freedom, *rebus integris*, to fulfil or desert their promise of marriage, yet when copula follows in reliance on such promise, the law infers and presumes the exchange of the proper consent *de præsenti*, as at the time of the copula, and thus holds the parties are married from thenceforward, and disabled from contracting any other marriage.

4. To the fourth of the said Interrogatories this Respondent answereth and saith, that he has already said that *rebus integris* the most express promise of marriage is always revocable on either side, and in no wise hinders either party from contracting marriage with some other person.

5. To the fifth of the said Interrogatories this Respondent answereth and saith, that it is substantially answered in the answers to the third and fourth Interrogatories, and that the promise becomes void by the repentance of the party promiser, though he or she may not be able to allege any change of circumstances in justification or excuse.

6. To the sixth of the said Interrogatories this Respondent answereth and saith, that he cannot well make an answer, in matter of law, in terms so broad and indiscriminate as the Interrogatory seems to require, but with respect to the effect of a promise and copula taking place in Scotland, and with a woman native of Scotland and domiciled there, that in his opinion there is no room for distinguishing in favour of the man, on the ground merely of his being a domiciled Englishman, and not possessed of any property or effects in Scotland, nor on the ground merely of his afterwards marrying another woman in England. Further deposes, that he cannot give it as his opinion, that in a competition between a marriage made by promise and copula in Scotland, and a marriage made afterwards regularly by the man in England, the validity of the former depends on the circumstances of the first wife having previously obtained a decree of the court declaring her marriage; and that it would not be just that any such prejudice to the right of the first wife should

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follow on her delay to ask such decree, which delay may be owing to her entire reliance on the man's honour, or may be in compliance with his injunctions, or be matter of agreement between them for prudential reasons. That when obtained, such decree of declarator publishes only, and executes, and does not form the relation, and thus the decree draws back and attaches to the date of those facts that are the substance and bottom of the case, and on which the law grounds its presumption of a consent *de præsenti*. Deposes and says, that one question of some difficulty may however be imagined, in the case of the first wife being in the certain and special knowledge of the man's addresses afterwards to another woman, and by her silence and course of conduct decidedly acquiescing in his second marriage; and certainly in any case where the first marriage is doubtful, and matter of inference only from a number of collateral particulars, such acquiescence will go far against the woman, not as a renunciation of the state of wife, or a bar *in limine* to her claim, but as matter of real evidence that she never had intended or understood herself to be the man's wife; and on this ground, in some measure, went the ultimate judgment in the case of Napier contra Napier, (Nov. 1800, and June 1801,) where a marriage regularly celebrated, and followed with the procreation of many children, was attempted to be set aside in respect of the man's alleged prior marriage, made by cohabitation only with another woman under the character of wife, which woman had acquiesced for years in the second marriage, though dwelling in the same town with the other parties: but that in the case of an explicit written promise of marriage, followed with copula, which is not of the same ambiguous description, the Deponent sees great difficulty in the way of sustaining the plea of personal objection as in bar of the first wife, whose state once duly contracted, is immutable, and cannot even expressly be renounced, and much less by any sort of implication; and this difficulty increases in the case of there being issue of the first marriage. That it is true the plea of personal objection was sustained in the Court of Session, in the case of Campbell of Carrick, 28th of July 1747, where the first wife had lived for years in the neighbourhood and in the society of the second, but that judgment was reversed in the House of Lords, and the parties were sent to proof upon the case. That upon the whole, in the case of the man contracting a second marriage in England, while the first wife continued to reside in Scotland, and is thus presumably ignorant, or has had an imperfect knowledge of the man's addresses, the Deponent sees no sufficient

reason,

reason, and knows no authority for sustaining the plea of personal objection against the woman.

7. To the seventh of the said Interrogatories this Respondent answereth and saith, that such a declaration if direct and explicit, is good evidence against the man under his own hand, that the proper matrimonial consent making the woman his lawful wife has already passed between them, as well as in substance, the delivery of such consent to the woman is the expression of his present consent to stand to her in that relation, and that it thus makes an immediate marriage.

8. To the eighth of the said Interrogatories this Respondent answereth and saith, that copula following on such a declaration, which is more than equivalent to a promise, is in that point of view sufficient to make a marriage by promise and copula; and that consummation accompanying such a declaration, whether before or after, is a powerful ingredient of evidence in confirmation of the declaration, as importing an immediate marriage, and not an engagement only.

9. To the ninth of the said Interrogatories this Respondent answereth and saith, that as a marriage may be effectually constituted by means of a series of letters, as between husband and wife, so when such a correspondence follows on a written declaration of marriage, those two modes of evidence mutually strengthen each other, and take the case out of the notion of a mere engagement to marry.

10. To the tenth of the said Interrogatories this Respondent answereth and saith, that it has already been said in his deposition in chief, that written declarations of marriage, how explicit soever, are liable to be controuled and expounded by the correspondence of parties, or by evidence in the conduct and behaviour of parties tending to shew that it was not their meaning, nor was it so understood or agreed between them, that they were actually married. Further this Respondent saith, that such questions are very nice and circumstantial, and require a studied attention to all the expressions used by the parties in their letters, and all the possible meanings of those expressions and the motives of parties to use them. That the Respondent would not consider it as materially shaking a declaration of marriage, that the parties in their letters alluded to a purpose of future public celebration, this being matter of decency, and for better repute in the world, as well as for the quiet of the woman's mind, who, though fast bound in law, may still feel humble and uneasy as long as the priest has not done his office. That neither would the

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Deponent consider it as materially shaking a declaration of marriage, that either party afterwards expressed fears of desertion, the evidence of the marriage in such cases being under the power of the parties, and liable to accidents, and they, uncertain in some measure, concerning the decision of the Law upon their case, no matter how positive and serious their purpose may have been to be instantly married by the writing they exchanged.

DAVID HUME.

The same Witness examined on the additional Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said additional Interrogatories, this Respondent answereth and saith, that these five sections of Sir Thomas Craig's Treatise *de Feudis* appear to the Respondent to contain a good deal of desultory discourse concerning marriage and legitimacy, and that sundry somewhat rash opinions are given there upon speculative points, which had not been tried in Craig's time, and remain untried still, and are nice and open to difference of opinion. That Craig is however good authority for the case of Edward Younger related in the nineteenth section, being a decision given in his own time on the matter of marriage contracted by promise *subsequente copulâ*; and although it appears that the course taken in that instance, and probably the usual course taken at that time, was, that the court gave decree for solemnization of the marriage, yet, in the Respondent's opinion, this was directed by the Consistorial Court out of regard to civil order and decency, and for the sake of notoriety only, and not upon the notion that the state of parties was not already irrevocably fixed by the promise and copula: and, indeed, that in Craig's own opinion, neither the solemnization, nor the decree for it, was indispensable; and that the marriage was truly made by the promise and copula themselves, appears from the opinion he gives at the head of the nineteenth section, viz. That a child is lawful who is procreated after contract of marriage and proclamation of banns, if the father die before the appointed day of marriage. That to the Respondent, the notion of decreeing to solemnize a marriage, that is to say, compelling a person to

give

give his consent out of love and affection, to live all his days with a certain woman, appears somewhat strange. That the decree cannot command the will of the man, and there is no species of diligence by which it can be carried into execution; and if the man is thus to be married in the end, without the help of a true and real consent *de præsenti*, and by means of a feigned and presumed consent, it is more reasonable to apply that presumption to the time of the promise and copula, which are the bottom and make the justice of the case, than to the date of the decree, which does but publish and declare these facts; that the form of decreeing for celebration, has therefore been laid aside in later times, as an unmeaning and unnecessary circuit, and this change of practice this Respondent considers as one in point of form, and not in the substance of the thing.

2. To the second of the said additional Interrogatories this Respondent answereth and saith, that Lord Stair's Exposition of the Grounds of the Law of Scotland respecting marriage by promise and copula, appears to the Respondent to be sound and correct, viz. That it proceeds on the presumption of things passing at the time of copula out of the state of promise *de futuro*, into that of actual marriage by consent *de præsenti*. That this, as the Respondent understands, is the established doctrine now, equally as it was in Lord Stair's time, and according to the Respondent's notes of the opinions of the judges in M'Adams case, the law was so delivered by Lord Meadowbank (13th Nov. 1806), "The "notion of law is, that copula is the consummation of a consent "*de præsenti*, which is thence presumed. It is not on the "notion of barring *locus penitentiæ*." That it is plain that Lord Stair himself did not understand his doctrine to be inconsistent with that of Craig; for, in the latter of the two passages referred to in this query, he founds upon Craig's authority, and the case of Edward Younger, and this in connexion with his own principle of a presumed consent *de præsenti*. That in like manner, in the former passage (Book 1. tit. iv. § 6.), and still in confirmation of his own principle, Lord Stair takes notice of a case in Nicholson's collection, where the like course was taken of decreeing for celebration on the grounds of the man's written acknowledgments of marriage and his procreation of children; that the Respondent understanding that, in both instances, the decree for celebration was given out of regard to order and example only, does consider the authority of Craig as no wise inconsistent with the principle or reason assigned by Stair.

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3, 4, 5, 6, 7, 8, 9. To the third, fourth, fifth, sixth, seventh, eighth and ninth of the said additional Interrogatories this Respondent answereth and saith, that the case of Grinton and Graite was argued by counsel of great eminence, and when very able judges sat on the bench; and the Deponent has always considered that judgment as having been deliberately given, and upon the general question of law, and not in respect of any specialty favourable to the woman pursuer (such as the nonproclamation of banns), and as decisive therefore of the proper character and effect of a marriage made by promise and copula. That if the like question were to occur again in the Court of Session, the judges, in his opinion, ought not, and as far as the Respondent can judge, would not think themselves at freedom to depart from that precedent, or to reconsider the question on a hearing in presence, or in any other shape. That the only case, so far as the Respondent knows, in any degree of a similar nature, which has since been tried, is that of Napier contra Napier already referred to, in November 1800, and June 1801; but here the prior marriage was to be inferred from a cohabitation of a very ambiguous kind, between a soldier and a woman who followed the regiment, and which had ceased for five or six years before the second and public marriage; and that for upwards of twenty years that the second wife lived, (in which period she bore seven children) no claim was made by the alleged first wife, though dwelling in the same city with the couple, and the question of legitimacy was only brought forward at last, at the instance of a child, after death of both women; that in these circumstances there seemed to be strong presumptive grounds of evidence against the first marriage, and on that footing the case was finally decided against the claimant, though the first interlocutor was the other way, and bastardized the whole issue of the second marriage.

10, 11. To the tenth and eleventh of the said additional Interrogatories this Respondent answereth and saith, that he cannot make an answer to these queries further than he has formerly done, without a much more specific and detailed case, laying before him the whole history and particulars of both connections, and the situation and conduct of all parties; that according to the circumstances, the previous non-production of the writings by the party who founds on them, may or may not be a matter unfavourable to that party in the way of presumptive evidence, and that so it may also be as to the failure of such party to prevent or protest against the man's contracting of a second marriage.

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12. To the twelfth of the said additional Interrogatories this Respondent answereth and saith, that he can give no opinion on this query, unless it were stated to him how far the Plaintiff was in the special and certain knowledge of the Defendant's intention to marry Miss Manners, and wilfully and inexcusably forbore to give notice of the impediment; and that even in the case of such wilful forbearance, the Respondent, as he has already answered, finds it very difficult to enter into the notion of renunciation of the state of wife, if once contracted in a plain and unambiguous way, as by exchange of acknowledgments, or by a written promise followed with copula. That if unattended with explicit acquiescence on the part of the Plaintiff, the circumstance of the Defendant having been in Scotland on military service, and having afterwards publicly married Miss Manners before the commencement of this action, could only be of weight as founding an inference, and this by no means a conclusive one, that the Defendant had not thoroughly understood his situation with the Plaintiff.

13. To the thirteenth of the said additional Interrogatories this Respondent answereth and saith, that he is not acquainted with any case of this description, and that the decision to be given on any such, cannot be matter of general rule, but must depend on the nature and circumstances of the connection of parties, the nativity of the man being one circumstance to be weighed along with others.

14, 15, 16. To the fourteenth, fifteenth, and sixteenth of said additional Interrogatories this Respondent answereth and saith, that such cases might occur, attended with a great diversity of other circumstances, according to which the decisions might be also different.

17. To the seventeenth of the said additional Interrogatories this Respondent answereth and saith, that a series of such letters written, as in this case, from England to a woman in Scotland, and by a person who had been in Scotland, and had written the like letters while there, would be good evidence of marriage against him, more especially, if while in Scotland he had also given written promises and acknowledgments of marriage, and might reasonably be presumed not to be quite ignorant of the custom of Scotland respecting marriages.

18, 19, 20. To the eighteenth, ninteenth, and twentieth of the said additional Interrogatories this Respondent answereth and saith, that he does not understand that there is any such thing known in the law of Scotland, as an irretractable engagement or obligation

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obligation to marry, and that no damages are even given *in solatium* of a disappointment by breach of engagement to marry how solemn soever, but damages only in reparation of patrimonial loss actually sustained by the party on such an occasion; the principle of the Scotch practice being, that the will of parties ought to be quite free and unbiassed at the moment of contracting this indissoluble union; that where an engagement to marry is followed by knowledge of the woman's person, things pass into a state of actual marriage, and that he is not acquainted with that intermediate condition of obligation, which is alluded to in this query.

21. To the twenty-first of the said additional Interrogatories this Respondent answereth and saith, that certainly the rule of the law of Scotland respecting promise and copula, is recommended by the evident and substantial justice of such a decision; but that in the Respondent's opinion, the rule is founded also in a just construction of the conduct and purpose and state of mind of the parties; and on that ground it is, that the doctrine has been recognized in the law, and is presented in the works of authors. That, in the Deponent's opinion, where copula follows between parties who have exchanged promise of marriage, this act has relation to and is under the seal of that contract, and is truly the implement and execution thereof in its most essential particular, the possession of each other's person, whereby matters pass, and are by the parties meant to pass out of the state of a promise *de futuro*, into that of an executed promise, or present marriage, whereof they have entered on the rights and duties. That in nature, this is what does and must pass in the minds of parties so situated, and on such an occasion; that the woman making delivery of her person in pursuance of the previous engagement, does *eo ipso* recognise the man *de præsenti* as her husband, of which character she admits him to the privileges, as he on the other hand claiming and taking these privileges in pursuance of his promise, substantially professes that character, and agrees *de præsenti* to bear it. That in the passage referred to in this query, this doctrine is distinctly delivered by Erskine, as relative to the case of copula following on a regular contract of marriage; and the Deponent sees no reason and knows no authority for distinguishing in this article between a regular contract and a written promise, if precise and explicit.

22. To the twenty-second of the said additional Interrogatories this Respondent answereth and saith, that he will not presume

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to say (no such question having been tried), that in no circumstances and by no mode of evidence can the presumption of a present consent be overcome, but he thinks it is clear that only the most pointed and convincing evidence shall prevail against the presumption.

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23. To the twenty-third of the said additional Interrogatories this Respondent answereth and saith, that he does not think it necessary to answer a question which appears to be fanciful and strange, and not to have any relation to the natural and ordinary course of things.

24. To the twenty-fourth of the said additional Interrogatories this Respondent answereth and saith, that he considers Lord Stair as by far the ablest and most profound of the writers on the law of Scotland, and his Institute as a work of higher authority than any of the other systems of that law, not excepting Sir Thomas Craig's work *de Feudis*. That the Respondent does not discover any looseness of thought, or inaccuracy of expression in the passages of Stair referred to, but rather precision in both respects; and that the doctrine delivered by Stair on the point in question, appears to the Respondent not to be in opposition to that of Craig, whom in one of the passages he expressly refers to; and that the difference between Craig and Stair is in this only, that Stair assigns the reason and principle of the rule, which is in his ordinary practice, and one of the recommendations of his work. That both Craig and Stair do mention judgments that had been given, sustaining marriage by promise and copula, and that the Respondent knows no authority more competent than Stair to explain the true grounds of those judgments; and that in these circumstances he must consider Lord Stair's *dictum* as good evidence of the tenor and meaning of the law.

25, 26. To the twenty-fifth and twenty-sixth of the said additional Interrogatories this Respondent answereth and saith, that a contract of marriage in Scotland is a solemn deed, and executed generally in presence of the relations of parties, and that it bears by common style a declaration in words as strong as those of any of the Exhibits; that the parties *de præsenti* do take one another for man and wife, but that the parties are nevertheless not held to be married thereby, because the contract also bears by common style a clause obliging the parties regularly to solemnize the marriage, from which joined with the whole other circumstances ordinarily attending such contracts, it is made evident that there was no purpose of dispensing with the ceremony, and that the contract was a preparation for it only; that these reasons

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reasons are in no ways applicable to writings, such as the Exhibits No. 2 and 10, which are given in circumstances of an opposite description, and for the purpose of superseding the ceremony, where it is found impracticable or ineligible. That in his answers to the Interrogatories in chief, the Respondent has already given his opinion as to the power of the writings, No. 2 and 10, to make an actual and irretractable marriage, more especially when followed by a series of acknowledgments in the Defendant's letters; and the Respondent has also signified his opinion of the view which ought to be taken of the matter of carnal intercourse between the parties, as a circumstance of evidence only, to mark their serious resolution to be immediately married, and not as the seal or completion of the contract.

27. To the twenty-seventh of the said additional Interrogatories this Respondent answereth and saith, that in his opinion, the Writings No. 2 and No. 10, were sufficient irrevocably to fix the parties as man and wife, unless it can be clearly shown by other evidence that they were not so meant and understood by the parties.

28. To the twenty-eighth of the said additional Interrogatories this Respondent answereth and saith, that by the mutual acknowledgement No. 2, and the mutual acknowledgment No. 10, more especially when attended with carnal intercourse, the Plaintiff was irrevocably married to the Defendant, and in a process of declaration of marriage he might have compelled her to exhibit those writings, if extant, and to take her oath as to her possession of them or her knowledge where they were to be found: or in case of her having destroyed the writings, she might in like manner have been put to her oath as to that fact, and evidence would have been admitted in the process of declarator, as to her former possession of these writings and the tenor and import thereof.

29. To the twenty-ninth of the said aditional Interrogatories this Respondent answereth and saith, that in the case of David M'Kie and Peggy Ferguson, 2d August 1781, marriage was declared on evidence of a present and mutual acceptance as spouses, which followed on their having been in bed some hours, and after which they separated, and did not meet again before the commencement of the process; that in the case of William Cowan contra Janet Hart, 20th January 1802, being a question concerning a widow's provisions, marriage was held to be effectually constituted by the act of parties, in going before a justice of the

peace

peace, and declaring themselves marri[illegible] as; that in this instance, as in M'Adam's case, the[illegible] d previously cohabited, and children had been be[illegible] no change moved on the declaration, nor was any c[illegible] erwards begotten to make room for the plea of *res non sunt* [illegible] *tegræ*; that the judgment of the Court of Session, in the case of Taylor and Kello, 16th February 1799, where no carnal intercourse had taken place, is also an acknowledgment of the principle that consent *de præsenti* does of itself make a marriage, and the Respondent has already said, that the reversal of this judgment is no wise to the impeachment of that principle, as the House of Lords proceeded upon circumstances of real evidence, in exposition of the true meaning and intent of the mutual written acceptances, as something different from what it imported on its face. That in the Case also of Elizabeth Ritchie contra James Wallace, 13th June 1792, the declaration of marriage, which was the ground of judgment, was given at the close and not at the outset of the connection of parties.

30. To the thirtieth of the said additional Interrogatories this Respondent answereth and saith, that a contract of marriage, however expressed, must be equivalent to a promise of marriage, and when followed with carnal intercourse it makes a marriage, for the same reason as a promise given in some less formal writing, or proved only by oath of party.

31. To the thirty-first of the said additional Interrogatories this Respondent answereth and saith, that this question is put too generally, and without the statement of a sufficient case. That to make way for such a plea, in protection of the regular and public marriage, it will be necessary to suppose these things; that the former woman has special and certain knowledge of the man's addresses to another, and this in such a way as must impress her with a belief of his serious resolution on the subject, which can hardly be without communication from himself; that she be so situated that she may easily and conveniently make her claim, and is not withheld by any reasonable motive from doing so. That she be allowed full time and opportunity to bring forward her claim, and that she have access to advice for the regulation of her conduct. That even where all these circumstances concur, the effect of the woman's silence must in a great measure depend upon the strength and clearness of the documents of her own prior contract, such conduct being a material ingredient of presumptive evidence against her, where her marriage is to be inferred from equivocal or ambiguous writings, and sufficient probably in

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in these circumstances, and as matter of presumptive evidence, to cast the balance against her; but with respect to a case of the opposite description, the Respondent can only say that the question, even when attended with all these favourable circumstances for the regular and public marriage, is one of great delicacy and nicety, more especially if the woman claiming have a child by the man, and if her acquiescence is not long continued after his marriage; and that considering this as at present an unsettled question, the Respondent cannot go the length of giving it as his opinion that a case may not occur in which the posterior public marriage ought to be found void; that more especially he hesitates to give any such opinion, as the law of Scotland holds out to every person who knows or suspects that he is liable to any such claim, the means of coming to a certainty of his condition, viz. by calling the suspected claimant in a process of declarator of putting to silence, of the nature of an English process of jactitation of marriage, and thus compelling her to advance her claim and have it tried, or else submit to have a decree given, finding that it is a groundless claim, and shutting her mouth for the future. That more particularly with relation to the present case, the Respondent is of opinion that this was the due and proper course to be observed by a person who had granted such acknowledgments of marriage as the Exhibits Nos. 2 and 10, or such a promise of marriage as the Exhibit No. 1, if followed with copula, or who had written such a series of letters as the other Exhibits in this case; and that thus circumstanced, the Defendant could not warrantably rely on the silence of the Plaintiff as putting his public marriage out of the reach of challenge. That in the Respondent's opinion, the public marriage in all such cases ought to operate, not as a bar *in limine*, or ground of a plea of personal objection, but as matter of presumptive evidence along with the other circumstances of the case.

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The same Witness examined on the further additional Interrogatories, given on behalf of the said John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said further additional Interrogatories this Respondent answereth and saith, that the case there mentioned was

was a very unfavourable one for Mrs. Cockrane, inasmuch as she had acquiesced in the man's marriage to another for a period of twenty years, during which she had lived in their neighbourhood and society, and even sometimes in family with them; and inasmuch as she brought forward her claim after the man's death only and for the sake only of a patrimonial interest as his widow; that for these reasons he does not think that the decision in that instance would be a rule for the present case, even if the judgment had not been altered on review; but that the judgment was reversed in the House of Lords, who sent back the case to the Court of Session, with an order to repel the plea in bar, or plea of personable objection, and allow a proof; which proof was taken accordingly, and on consideration of it judgment was finally given, (21st June 1751) finding "That Mrs. Magdalen Cockrane had not proven her prior marriage libelled."

2. To the second of the said further additional Interrogatories this Respondent answereth and saith, that he has already sworn at large on that head, in his answers to the several of the preceding Interrogatories; and on considering the decision referred to in this query, he does not see any reason to alter the opinion formerly given, as to the effect of copula following on a promise; that what is said in Kilkerran respecting Hyslop's case, appears to the Respondent not to be the opinion of the bench, or of the judge reporter, but the argument of counsel only; and besides that, much weight cannot be given to a passing expression falling from the bench, when relative to a former case and not necessary to the decision of the case in hand, in which there was no question of marriage at all, or impediment by intervening marriage.

3. To the third of the said further additional Interrogatories this Respondent answereth and saith, that he has perused the said decision with which he is well acquainted, and sees no cause to alter his answers to any of the preceding Interrogatories, and that he agrees with the judge reporter, in thinking that insinuations, or light and passing promises of marriage, are not sufficient grounds of a declarator of marriage, though followed with copula, and that every such promise to be effectual, must be serious, deliberate, and explicit.

4. To the fourth of the said further additional Interrogatories this Respondent answereth and saith, that Lord Kaimes is known to have entertained many peculiar notions on matters of Scotch law, and that his work mentioned in this query is in a great measure a collection of these singular opinions, insomuch that at one time he meant to publish it with this title: "What *is* Law, and ought not

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not to be Law, and what *ought* to be Law and *is not* Law." That his opinion on the article in question, has not shaken the authority of the decision, in the case of Pennycook and Grinton, which was intended as a settlement of the question of law, and is so reported in the collection of decisions published by authority of the faculty of advocates, and was not influenced, as Lord Kaimes supposes, by the circumstance of non-publication of banns.

In the close of all, the Respondent hopes he shall be pardoned for observing, that although he has answered the additional and further additional Interrogatories out of deference for the counsel whose names appear at them, yet still he cannot but consider them as being of an unusual, and an exceptionable tenor and style, and such as are fitter for the detection of a witness who is suspected of perjury on a matter of fact, than of a lawyer called to give a professional opinion; and that if evidence concerning the law of Scotland is to be taken after this fashion, the counsel at the Scotch bar must be disposed to decline giving their assistance on any such occasion.

DAVID HUME

7th August 1809.

Repeated and acknowledged before me,
at Edinburgh, the undersigned
WM. COULTER, Lord Provost.

In the Presence of HARRY DAVIDSON,
Not. Pub. and Actuary assumed.

On the LIBEL and EXHIBITS given on behalf of Mrs. DALRYMPLE.

7th June 1809.

ROBERT HODSHON CAY.

ROBERT HODSHON CAY, of the city of Edinburgh, Doctor of Laws, aged about fifty-one years, a Witness produced and sworn, deposes and says, that he has practised as an Advocate before the Supreme Court of Session in Scotland since 1780, and that he acted as one of the judges in the Commissary Court of Edinburgh, which is the Consistorial Court of Scotland, from 1788 till 1801, since which last period, he has held the situation of Judge of the High Court of Admiralty in Scotland. And further

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to the eleventh article of the said Libel he deposes and says, that he has attentively perused and considered the said eleventh article and the several Exhibits annexed to the Libel, and that he is clearly and decidedly of opinion, that if the hand-writing of these Exhibits, and a cohabitation of the parties in consequence thereof, were acknowledged or proven, they together with such cohabitation (copula) would be sufficient by the law of Scotland to constitute marriage between the parties. That during the twelve years the Deponent held the situation of one of the Judges of the Commissary Court of Edinburgh, as above deposed to, no decision of that court was pronounced contrary to this opinion, nor is the Deponent acquainted with any decision of the Commissary Court, even as altered or corrected by the Court of Session or the House of Lords, (those of Taylor contra Kello, M'Innes contra More, Dobson contra M'Laughlane, and Anderson contra Fullerton, not excepted) which appear to him, when thoroughly considered, to be adverse to the principles on which his opinion is founded.

The same Witness examined on the Interrogatories given on behalf of John William Henry Dalrymple, the other Party in this Cause.

1. To the first of the said Interrogatories this Respondent answereth and saith, that he is not acquainted with the laws and usages of Scotland at any period (since the Reformation was fully established at least) in which writings of the tenor of those annexed to this Libel, together with a consequent and subsequent copula, would not have been held to constitute marriage.

2. To the second of the said Interrogatories this Respondent answereth and saith, that the law of Scotland on this subject may be collected and ascertained from the reported and recorded decisions of the courts of justice, and from the writings of authors of acknowledged and received authority; and the Deponent has formed his opinion from these sources, and from the received law and uniform practice of the Commissary Court, while he had the honour of sitting on that bench, as well as from a careful perusal of all or most of the prior records of that court, which are preserved in an accessible state, together with an unremitted attention to the proceedings and decisions of the Court of Session when reviewing consistorial decisions ever since he left the Commissary Court.

3. To the third of the said Interrogatories this Respondent answereth and saith, that he knows of no difference between the

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legal effects of a marriage constituted by a consent *de præsenti cum subsequente copula*, and a marriage celebrated in *facie ecclesiæ*, unless the fine or other punishment to which the former, as a clandestine marriage, may subject the parties, were to be esteemed such a difference. The distinction between a marriage constituted by a consent *de præsenti cum copula*, and by a promise *cum copula*, does not appear to the Deponent to be received or adopted in our courts of justice, which, to the best of the Deponent's knowledge and belief, have at no time acknowledged the passages in the Elucidations of a celebrated author on this subject, as being of any authority.

4. To the fourth of the said Interrogatories, this Respondent answereth and saith, that in his apprehension, a marriage constituted by mutual consent *de præsenti* with a subsequent copula, would be held binding upon the woman as well as upon the man. Cases of this kind where the woman is Defendant are extremely rare. That of Taylor contra Kello, does not appear to be adverse to the Deponent's opinion, for in that case no copula was proven or admitted, and circumstances occurred and were noticed in the judgment of the House of Lords, 16 Feb. 1787, and were held to negative any marriage whatever, regular or irregular, between the parties. Marriage to be binding on both parties must be constituted by mutual consent, and it is only on the consent of the woman taken in conjunction with that of the man, that any action of adherence against her can be founded.

5. To the fifth of the said Interrogatories this Respondent answereth and saith, that he knows of no alteration in the situation of the man that could take away a woman's right to have a prior marriage declared; a subsequent marriage in *facie ecclesiæ* between the woman and another man, might affect her right of action to have the first marriage declared, because such action could not be maintained without professing herself guilty of bigamy, which perhaps a court of justice would not permit her to do, and *cui bono* maintain an action, which would be altogether nugatory; the second marriage affording to the first husband, an unexceptionable ground for divorce.

6. To the sixth of the said Interrogatories this Respondent answereth and saith, that he conceives that where a marriage is constituted in Scotland by a consent *de præsenti cum subsequente copula*, that any subsequent marriage in England, or elsewhere, would be null and void, even although the Scots marriage had not been previously made the foundation of any proceedings in the courts of Scotland; and that he is not aware of any distinction in this

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this respect between a marriage constituted by consent *de præsenti cum copula*, and a marriage constituted by promise *cum copula*; nor does he think the circumstances alluded to in the conclusion of the Interrogatory, of a man's ceasing to be a domiciled Scotsman, could liberate him from legal obligations validly contracted prior to the alteration of his residence.

7. To the seventh of the said Interrogatories this Respondent answereth and saith, that he would hold a mere declaration in writing to be only equivalent to the clause in most ante-nuptial contracts of marriage, whereby the parties declare in words *de præsenti*, that they accept of one another as husband and wife, and consequently as, *per se*, only constituting an obligation to marry. But that if such written declaration were followed by habit and repute, (publicly residing together, owning and acknowledging each other as husband and wife, and being so held and reputed) by subsequent copula or by actual regular celebration, that it would in conjunction with any one of those circumstances occurring in Scotland, constitute a lawful and irrevocable marriage according to the law of Scotland.

8. To the eighth of the said Interrogatories this Respondent answereth and saith, that it is already answered in so far as relates to a subsequent copula, where the copula has been antecedent to the declaration; and where no such copula follows its date, some doubt may be entertained, as questions might be let in as to the views or motives of granting and accepting of such declaration, as in More contra M'Innes, decided ultimately in the House of Lords, by reversing the decrees of the Courts below, on 25 June 1782.

9. To the ninth of the said Interrogatories this Respondent answereth and saith, that the circumstances here set forth, if attended by copula, would undoubtedly constitute marriage; if not attended by copula, would in the Respondent's apprehension only constitute an obligation to marry, though he is well aware that some difference of opinion prevails among lawyers on this last mentioned point, on the application of the rule *consensus non concubitus facit matrimonium*.

10. To the tenth of the said Interrogatories this Respondent answereth and saith, that mistakes or doubts or apprehensions with respect to the legal effects of what has passed between the parties cannot affect the rights or obligations of either, which may be declared or enforced at any period, notwithstanding any intervening doubts or apprehensions on the part of either or of both.

R. HODSHON CAY.

ROBERT HODSHON CAY.

The same Witness examined on the additional and further additional Interrogatories given on behalf of John William Henry Dalrymple, Esq. the other Party in this Cause.

1. To the first of the said additional Interrogatories this Respondent answereth and saith, that he has not been in the habit of considering the opinions of Sir Thomas Craig as of super-eminent authority in consistorial questions. For some time previous to the assembling of the Council of Trent, the inordinate ambition of the Romish church had induced the Consistorial Courts, then universally held by churchmen, to confound the civil effects of a mere consensual contract, with the mysterious ecclesiastical effects of the supposed sacrament: these usurpations were confirmed by that council, and the consistorial law, as administered by the church courts, from that time till the Reformation, conceived themselves bound to deny all effect whatever to such marriages as had not been duly celebrated as a sacrament. That Sir Thos. Craig wrote his treatise *de feudis* very recently after the Reformation, at a time therefore when the rules and decisions on which his opinion must have been founded, could only relate to the *Jus tunc prope hodiernum* of the Romish church courts. That the Respondent cannot possibly say how far his (Sir Thomas Craig's) opinions were or were not agreeable to what might be conceived to be the consistorial law of Scotland at that time, though, for the reason already given, he thinks it doubtful whether Scotland could at that time be said, with any propriety, to possess any settled consistorial law. That the courts and the lawyers of the reformed church have in Scotland concurred in rejecting the more modern ecclesiastical law of Rome, though they still reverence and respect the decretals, which were issued before the ecclesiastical doctrines of that church were infected with the corruptions afterwards sanctioned by the Council of Trent. These more ancient decretals are therefore quoted and acknowledged as authorities in the Consistorial Courts of this part of the united kingdoms. That as to the passages referred to in this query, in so far as they relate to legitimacy and legitimation, the Respondent means to give no opinion, as they have no relation to the article of the Libel on which he was examined, nor to the answers which he gave to the examination in chief; and with respect to the first sentence in § 21, it appears to the Respondent not very consistent

consistent with the more ancient canon law itself, which continues to be regarded as making a part of the law of Scotland, in which we find the following direct and unequivocal authority: Lib. 4. tit. 1. Decret. Gregorii IX. *De Sponsalibus et Matrimonio,* "*Is, qui fidem dedit mulieri super matrimonio contrahendo, carnali copula subsecuta, si in facie ecclesiæ ducat aliam et cognoscat, ad primam redire tenetur; quia licet præsumptum primum matrimonium videatur, contra præsumptionem, tamen hujus modi non est probatio admittenda.*" "*Ex quo sequitur, quod nec verum, nec aliquod censetur matrimonium, quod de facto, est post-modum subsecutum.*" That it may further be observed, that even in the time of Sir Thos. Craig, it began to be held, that actual celebration was not held to be absolutely and essentially necessary, as appears from the case of Younger cited by him in § 19; that the changes, if any, which have taken place in the law of Scotland since Sir Thomas Craig's time, have, the Respondent conceives, arisen partly from a firmer rejection of the rules of the Romish church, and the decisions of the Romish church courts during the times immediately anterior to the Reformation; partly from a stricter attention to the more ancient regulations of the Romish church while it was yet untainted by the anomalies which an inordinate ambition afterwards introduced, and partly from the natural consequences of the Reformation itself, and the more enlarged notions of jurisprudence to which that Reformation give birth. That these perhaps, with other causes to the Respondent unknown, gave rise to a series of decisions, which have fixed the law on the footing on which it now stands.

2. To the second of the said additional Interrogatories this Respondent answereth and saith, that he has always considered the passages in Stair's Institutions referred to, as much more consonant to the genius of the Protestant Consistorial law of Scotland, than those referred to in the preceding Interrogatory; that on some particular points he is not very full nor very explicit, but so far as he goes, the Respondent thinks his opinion consistent with the law of Scotland as it stands now. By that time it had been decided that acknowledgments of marriage *cum copulâ* constituted actual marriage, not a mere obligation to marry, as is at least strongly inferred from the passage quoted from Nicholson *de Nuptiis* in the section first referred to in this Interrogatory. That the passages referred to in Book III. Tit. 3, in so far as they relate to legitimacy, the Respondent does not mean to speak to, but on that passage in which he says, that "after contract," (by which the Respondent understands an express consent *de præsenti*) "or

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" promise of marriage, or *sponsalia*, if copulation follow, there is " thence presumed a matrimonial consent *de præsenti*, which " therefore cannot be passed from by either or both parties, as " having the essential requisites of marriage." The Respondent may observe, that it is confirmed and corroborated by another passage in the work of the same learned and noble author, Book IV. tit. 45, § 19, where he says, " Marriage is proved by the *sponsalia* preceding, as by the contract of marriage whereby the parties oblige themselves to solemnize marriage and by copulation following, or even by antecedent promise of marriage, whatever be the way that it is obtained or granted, if copulation follow without violence; although the promise were conditional, and that the condition is no otherways purified but by copulation." (by " purified " in the Scots law idiom is meant fulfilled.) This doctrine the Respondent considers to be conformable to the law of Scotland, as the same has been since determined in a variety of cases.

3. To the third of the said additional Interrogatories this Respondent answereth and saith, that he conceives the decision in the case of Pennycook and Grinton against Grinton and Graite, to have been pronounced in conformity with the rule of the ancient canonical law already quoted; with the passages to be found in Lord Stair's Institutes; with the decision in the House of Lords in the case of Jean Campbell and her daughter, against Colin Campbell and Magdalen Cochrane, pronounced 6th of February 1748; with the subsequent decision, 23d of February 1785, Helen Inglis against Alexander Robertson; and with the general tenor and principles of the consistorial law of Scotland. And the Respondent having mentioned the case of Campbell against Cochrane, will take the liberty of adding a few of the circumstances of that case, as collected from the records of the Commissary Court. Captain John Campbell, of Carrick, on the 9th of December 1725, was, without previous proclamation of banns, married to Jean Campbell, by a clergyman, and a certificate of that marriage was granted, signed by the clergyman and by two witnesses; and as this marriage was private, and in so far irregular, John Campbell the husband, and afterwards Jean Campbell the wife, appeared before the proper Ecclesiastical Court, to answer for the irregularity, when they were severally rebuked for the said irregularity, and did severally enact themselves to adhere in all times coming, and to be faithful and kind one to another; by all which the *labes* of the irregularity was done away. After this they publicly resided together as husband and wife for twenty years,

years, and were held and reputed as such, and the other pursuer Jean Campbell the younger, was the issue of that marriage, and was held and reputed as the lawful issue thereof. After the death of John Campbell the husband, Magdalen Cochrane obtained letters of administration in England, as his widow, with a view of obtaining the pension due as to an officer's widow. Jean Campbell and her daughter raised an action before the commissaries of Edinburgh to have it found and declared that she was the lawful widow, and the other the lawful child of John Campbell. In that action no appearance was made for Magdalen Cochrane, a proof was allowed, and it came out in evidence, not only that no claim was ever openly urged by Cochrane, during the lifetime of John Campbell, but that, on more than one occasion, she, Magdalen Cochrane, had been in company with Jean Campbell and others, and heard and seen her, Jean Campbell, treated and addressed as the wife of John Campbell, while she suffered herself to be treated and addressed as the widow of one Kennedy, a former husband. After this proof was had, Magdalen Cochrane brought a cross action of declarator, in which she founded upon an alleged holograph acknowledgment by John Campbell, dated 3d July 1724, bearing that he was solemnly and lawfully married to Magdalen Cochrane, but without mentioning the date of such marriage, and this pretended marriage having been as alleged prior to that of Jean Campbell, concluding *inter alia* to have it found and declared that Captain John Campbell and Mrs. Jean Campbell were never lawfully married together, and that it is false, groundless, and injurious to her to allege any such thing, &c. Both parties were assisted by most able and industrious counsel. It was pleaded for Mrs. Campbell, that a formal marriage, followed by open and public cohabitation, habit, and repute, was not, after subsisting for twenty years, to be set aside, and the children bastardized, by an alleged secret and latent marriage, though said to have been prior in date; and that therefore no proof should be allowed of such alleged prior clandestine marriage, especially after the death of the alleged husband, who alone could be able effectually to traverse such proof: and further, that Magdalen Cochrane, by allowing the marriage to subsist openly for twenty years, nay, by suffering Jean Campbell, without contradiction, to be treated as the lawful wife in her own presence, was now barred *personali exceptione* from leading any proof to the contrary; these pleas were undoubtedly invincible on the supposition that what was alleged to have passed between John Campbell and Magdalen Cochrane (there being no issue from their alleged connection,) only inferred an

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an obligation to marry, without actually constituting marriage between the parties. One of the pleas was urged in the following words: — Commissary Record, page 107, "A promise of marriage *cum copulâ*, has this effect, to oblige the refractory party by a process at law to fulfil, but if, before sentence is pronounced, the refractory party be publicly married to another, the marriage is good and cannot be avoided by the allegances of the antecedent promise and copula with another." But this, and all other pleas in bar urged to exclude Magdalen Cochrane from leading a proof to the effect, if she succeeded in that proof, of depriving Jean Campbell of the *status* she had openly acquired and publicly enjoyed during twenty years, was repelled by the Commissaries, who by their interlocutor, 23rd June 1747, "Before answer allowed the said Mrs. Magdalen Cochrane a proof of her libel, and of all facts and circumstances tending to infer the marriage libelled." Of this interlocutor, Jean Campbell complained to the Court of Session. Her bill of advocation was refused by the Lord Arniston, 7th July 1747; she then presented a petition against that interlocutor of Lord Arniston, praying the court "In consideration of the peculiar circumstances of this case, to find that Mrs. Magdalen Cochrane is barred *personali exceptione* from insisting in this declarator of her pretended marriage." The Court of Session were of a different opinion from the Commissaries, for they, by their interlocutor, 29th July 1747, "Remitted the cause to the Commissaries with this instruction, to find that Mrs. Kennedy was barred *personali exceptione* from being admitted to proof that she was married to Mr. Campbell of Carrick, before he was married to Mrs. Jean Campbell," and this remit was applied by the Commissaries. Mrs. Kennedy entered her appeal to the House of Lords, complaining of this interlocutor, and the Appellant's counsel having been heard on the 6th of February 1748, their Lordships (the counsel for the Respondent being likewise heard and consenting thereto,) reversed the interlocutor of the Court of Session, and returned to that of the Commissaries, allowing a proof, thereby virtually finding that no degree of concealment of a marriage by both parties, and no silence, or even acquiescence of the woman in a posterior public and open marriage of the man with another woman, could bar her at any after period, even after the death of the alleged husband, from asserting her own individual rights as widow (there being no issue of her own connection), even to the effect of annulling a posterior public marriage, and depriving the widow of such public marriage of her *status*, and place in society as such. It is

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very true that Mrs. Cochrane (or Kennedy) ailed to prove any marriage between her and Captain Campbell, and therefore Mrs. Jean Campbell was assoilzied from Magdalen Cochrane's declarator, and finally prevailed in her own. But this went on the point of fact alone, and no way touches the point of law. Upon the whole, the Respondent is of opinion that the case of Pennycook and Grinton against Grinton and Graite, though certainly a very strong case indeed, was well decided, and according to the principles of Scots law, by which a promise and copula, and *multo magis* a consent *de præsenti*, with subsequent consummation, constitutes marriage itself, not a mere obligation to marry; and consequently it follows, that a woman having by these or any other means acquired the right and *status* of a wife, cannot be deprived of them by any subsequent marriage between her husband and any other woman.

4. To the fourth of the said additional Interrogatories this Respondent answereth and saith, that cases of this kind are fortunately extremely rare, and that he does not recollect any subsequent case precisely similar in all its circumstances to that alluded to; that in the case of Helen Inglis against Alexander Robertson, the Commissaries, 23rd February 1785, found, that acknowledgements, as of a past marriage in letters, were sufficient to found a declarator of marriage against the Defendant, although he had been subsequently married to another woman by whom he had issue, and this, although there was no issue of the alleged connection between the pursuer and defender; and found the pursuer and defender married persons accordingly. And this judgment was affirmed by the Court of Session, 3rd of March 1786; the circumstance of there having been issue of the second marriage is not mentioned in the report, but was asserted on the one part and not denied on the other in the printed arguments, on which the case was determined in the Court of Session. That this case was not altogether so strong as that of Pennycook against Grinton, but the Respondent considers the principle which regulated that decision, viz. that even promise *cum copula* so effectually constitutes marriage in Scotland, that its effects cannot be obviated by any conduct, consent, disclamation, or discharge by the woman, nor by any subsequent marriage by the man, to be so firmly rooted in the law of Scotland, that nothing short of an act of the legislature can possibly overset it.

5, 6, 7, 8, 9. To the fifth, sixth, seventh, eighth and ninth of the said additional Interrogatories this Respondent answereth and saith, that the law of Scotland is fortunately like that of all

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all other countries, capable of gradual expansion and improvement, and that hearings in presence, that is, solemn arguments, are sometimes ordered with a view of applying the principles of the law to particular and unusual cases, and even sometimes to review, and if necessary, to correct the application of immutable principles to cases and situations similar to those which had been formerly decided. But the Respondent does not conceive that the Court of Session would order a hearing in presence, or betray any other symptom of hesitation, on a case of a consent to marry *per verba de præsenti*, proven by written evidence, the authenticity of which should be acknowledged or proven, attended by a subsequent and consequent consummation also acknowledged or proven. That it is not for him to say what the Court of Session would do in a case precisely similar to that of Pennycook and Grinton, but were a case similar to that in all its circumstances again to occur, it would not at all surprise him were they to order it to be solemnly argued at their bar, though he is of opinion that the ultimate decision would be similar to that formerly pronounced.

11. To the tenth of the said additional Interrogatories this Respondent answereth and saith, that he is of opinion that the prior latency of the writings would not be held to derogate from their effect, when afterwards made the foundation of legal proceedings.

10. To the eleventh of the said additional Interrogatories this Respondent answereth and saith, that he does not consider this Interrogatory as at all applicable to the case stated in the Libel, which appears to him to rest not on the ground of promise *de futuro cum copula subsequente*, but on that of marriage constituted by consent *de præsenti*, with subsequent and consequent consummation; though upon the grounds repeatedly stated, he is of opinion that a subsequent marriage, however formal, would not obstruct a declarator of marriage founded on a promise with subsequent and consequent copula, also prior to such formal marriage with another woman.

12. To the twelfth of the said additional Interrogatories this Respondent answereth and saith, that this Interrogatory does not appear to bear any direct relation to any passage in the article of the Libel upon which the Respondent was examined in chief, but he does not hesitate to say, that the effect of any subsequent marriage between the Defendant and any other woman, would be weakened rather than strengthened, if that circumstance took place not in Scotland where the Plaintiff lived, and where she

might

might have interfered to prevent it, but in a foreign country and at a distance from her residence.

13. To the thirteenth of the said additional Interrogatories this Respondent answereth and saith, that the laws and usages of Scotland would in his opinion be held as applicable to any marriage contracted in Scotland by any foreigner, whether a military officer or not, who had, previous to entering into such contract, resided above 40 days in Scotland. The law and practice of Scotland as to the *forum domicilii*, seem not so strictly to require the full residence of forty days in the case of a military man, as in that of a foreigner residing in Scotland in a mere civil capacity, Lees against Parlan, 12th November 1709, Fountainhall, and Dictionary of Decisions, vol. i. page 326.

14, 15, 16, and 17. To the fourteenth, fifteenth, sixteenth, and seventeenth of the said additional Interrogatories this Respondent answereth and saith, that as they relate to hypothetical cases, which in so far as he knows have not been agitated, and which perhaps never may occur, and as the decisions in such cases, were they ever to happen, might be materially affected by the special circumstances of each, he declines to give a decided opinion on such general statements as those contained in the aforesaid Interrogatories.

18. To the eighteenth of the said additional Interrogatories this Respondent answereth and saith, that by the law of Scotland he understands that even a promise *de futuro cum subsequente copulâ*, (*multo magis* a consent *de præsenti cum consummatione*) constitutes actual marriage, in terms of the thirtieth chapter of the first title of the fourth book of the Decretals of Gregory the Ninth, which, as it was compiled prior to the corruptions sanctioned by the Council of Trent, is received by our Courts as an authority in matters of this kind, and in terms of repeated decision of the Scots courts, so as not to be derogated from by any act of either party, or by the subsequent regular or irregular marriage of either.

19, 20. To the nineteenth and twentieth of the said additional Interrogatories this Respondent answereth and saith, that according to the law of Scotland, he knows of no obligation to marry, followed by a copula, in consequence thereof, which can according to the law of Scotland be retracted by either party or by both.

21. 22. To the twenty-first and twenty-second of the said additional Interrogatories this Respondent answereth and saith, that the constitution of marriage by promise and copula which does

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does not appear to him to be the case before him) rests on the ground of the passage already quoted from the Decretals, as well as repeated decisions of the courts in Scotland, the result of which is, that the presumption of present matrimonial consent at the moment of a copula permitted and enjoyed in consequence of a prior consent, admits not of being redargued by any proof, acknowledgment, discharge, dissent, or subsequent event whatever; but does *ipso facto* constitute marriage between the parties, incapable of dissolution by any means short of those which would have dissolved a marriage regularly and publicly solemnized *in facie ecclesiæ*; that such events do not constitute a mere obligation to marry in favour of the woman, the validity of which is to depend on the future actual celebration, appears to have been very early determined, as in the case of Younger, mentioned by Sir Thomas Craig in the nineteenth section, referred to in the Respondent's answer to the first of said additional Interrogatories; likewise by the following subsequent decisions, sustaining declarators on such grounds after actual celebration had become impossible, in consequence of the death of the husband; in the case of Barclay against Napier, cited by Lord Stair, B. I. Tit. 4. § 6.; vide also Hope voce Husband and wife, and Kerse M. S. 64; 23d February 1714, Anderson against Wisheart, vide Forbes, M. S.; June 1730, Murray against Smith, vide Dictionary, vol. II. page 530, where it will be found that action was sustained after the death of the husband, though the particular mode of proof offered was rejected; 28th July 1747, Campbell against Cochrane, alias Kennedy, where action was sustained by the Commissaries, and their judgment affirmed by the House of Lords, Falconer and Records and Appeal cases; 18th November 1766, Agnes Johnston against Smiths; 13th November 1795, Anderson against Fullerton; 28th November 1801, M'Gregor and Campbell against Campbell, in which last mentioned cases action was sustained, but the proof of marriage afterwards failed; 20th January 1802, Crawford's Trustees against Hart, where the widow was successful; 4th March 1807, Elizabeth Walker against M'Adam's Trustees, where also the widow was successful. That correct legal ideas upon this subject may be formed from the usual style of decrees of adherence on the ground of promise and copula, which does not ordain the defender to celebrate marriage, but finds facts, &c. proven relevant to infer marriage as having already taken place, and finds and declares the pursuer and defender married persons, and the Defender lawful wife (or husband) to the pursuer, and ordains the

defender

defender to adhere to the pursuer in all time to come. That the right of action is not cut off or barred by a subsequent marriage of the defender with another, appears from the decisions in the cases of Pennycook and Grinton against Grinton and Graite, where there was issue of both connections; and in those of Campbell against Cochrane or Kennedy already cited, and Inglis against Robertson, 23rd February 1785, in both of which action was sustained, though there was no issue of the first connection, and though the object of both was to set aside a marriage publicly avowed, of which there was issue reputed lawful, and which such action in the last-mentioned case proved ultimately successful: that such irregular proceedings do not confer a mere right of action on the injured woman, which she might renounce, abandon, or discharge, appears from the following decisions: the case cited by Stair, Book I. Tit. 4. § 6, from Nicholson de Nuptiis: the case of Elizabeth Castlelaw against Agnew of Shenchan, being a declarator of marriage on the ground of promise *cum copula*, in which the defender produced "a discharge "granted by the pursuer to the defender, of date 25th No- "vember 1715, whereby the said pursuer granted her to have "received from the said defender, full and complete payment of "all fees due to her for five years service, preceding Martinmas "1715; wherefore she discharged the said defender of all fees "due to her for the said service, and of all pretensions of mar- "riage that she could claim of the said defender;" the Commissaries, the 15th August 1717, "found the promise of marriage, "with the posterior copula or concubitus libelled, relevant to "infer the conclusion of the libel, and probable by the de- "fender's oath of verity, and found the discharge not sufficient to "elide the same;" vide Commissary Records, page 380; and although the case was afterwards most keenly contested, the justice of this interlocutor was not afterwards disputed in the Court of Session. So also in the case of Jean Campbell against Cochrane, it came out in evidence, that Mrs. Cochrane or Kennedy had not only acquiesced for twenty years in the deceased Captain Campbell's marriage with Jean Campbell, but had in public companies, during their cohabitation, herself addressed her in the character of Captain Campbell's wife, acquiescing in the designation of widow Kennedy, repeatedly applied to herself by the individuals composing the same company, yet this was found to be no bar to her action, and the judgment of the Commissaries was affirmed by the House of Lords. Lastly, in the case of Pennycook and Grinton contra Grinton and Graite, Agnes Pennycook

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Pennycook at first brought an action for inlying charges, and the damages due to her for debauching and leaving her, yet this was not found sufficient to bar her from prosecuting and succeeding in a subsequent declarator, in which she was successful in establishing her own marriage and setting aside the subsequently publicly avowed marriage with Graite, of which too there had been issue. That from these authorities it follows, that the presumption of a present matrimonial consent *tempore coitûs*, when a previous promise had been given and accepted between the parties, cannot be traversed by any proof however strong and direct; that when the woman submitted to the man's embraces, she did so, not *intuitu matrimonii*, or on the faith and belief that she thereby became his wife. That hence the Respondent is of opinion, that if the case stated in the libel now before him, rested only on the ground of a promise *cum copula*, instead of a mutual present consent with consummation, that it would constitute actual and indissoluble marriage between the parties. That as to the passage in Erskine alluded to in the interrogatory, the Respondent is of opinion that it is so far defective, that it does not state the presumption spoken of to be a *præsumptio juris et de jure*, not to be controverted by any evidence whatever.

23. To the twenty-third of the said additional Interrogatories this Respondent answereth and saith, that the case here put has, so far as he knows, never been argued or determined in the courts in Scotland, and does not appear to the Respondent to have reference to the case originally put and spoken to by him.

24. To the twenty-fourth of the said additional Interrogatories this Respondent answereth and saith, that as his opinion does not, as has been seen, rest on the authority of Lord Stair alone, he deems it unnecessary to make any answer to this question, further than such as have been already given.

25, 26. To the twenty-fifth and twenty-sixth of the said additional Interrogatories this Respondent answereth and saith, that they have been already answered in substance, he having stated an opinion, in which however he is aware that many lawyers may differ, from which it may be inferred that neither a regular contract of marriage in the usual style, nor the writings in process, would in his opinion be sufficient to constitute an irrevocable marriage, unless either actual celebration, habit and repute, or carnal copulation, had followed.

27. To the twenty-seventh of the said additional Interrogatories this

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this Respondent answereth and saith, that those exhibits are of such a nature, as if attended with either of the three circumstances mentioned in his answer to the two immediately preceding Interrogatories, would bar either party from retracting.

28. To the twenty-eighth of said additional Interrogatories this Respondent answereth and saith, that the Plaintiff by the exhibit No. 2, provided the handwriting thereof were acknowledged and proven, and a subsequent and consequent copula were also acknowledged and proven, would, by the law of Scotland, have been found to have contracted the indissoluble bonds of matrimony with the defendant. That, had the plaintiff destroyed these writings, the defendant might have founded his action against the plaintiff on the counterpart of the correspondence in his own hands; and if even these had failed, might have instructed the consent by the plaintiff's oath, and the copula *prout de jure*, or by the plaintiff's oath.

29. To the twenty-ninth of the said additional Interrogatories this Respondent answereth and saith, that he cannot at this moment recollect any case, such as that referred to in this Interrogatory; as the case of Anderson against Fullerton, though action was there sustained in particular circumstances, had it been successful, it would not in the Respondent's apprehension have come up to the spirit of the Interrogatory.

30. To the thirtieth of the said additional Interrogatories this Respondent answereth and saith, that in his apprehension every expression of deliberate and present mutual matrimonial consent, followed by copula, constitutes matrimony upon stronger and more incontrovertible grounds, well known to every lawyer. than any marriage constituted by promises *de futuro*, however solemn, and though also followed by copula.

31. To the thirty-first of the said additional Interrogatories this Respondent answereth and saith, that such second marriage would be made void, because the prior marriage being complete and valid by the law of Scotland, no second marriage could be legal while the first remained undissolved.

That before taking leave of these additional Interrogatories this Respondent must take the liberty to observe, that in answering them he is conscious he may have committed two errors: that he may have derogated from the dignity of his profession, in submitting to the toil and disgust of answering Interrogatories, which, considered as cross questions, are irregular in their structure and degrading by the insinuations they imply; and he may have betrayed the best interests of the court from which they

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issue, by contributing to shut out the truth in time to come. Scots law, to an English court of justice, is matter of fact, and as such to be established by evidence; but the sources of the most legitimate information may be stopped, if professional men, by consenting (for they cannot be compelled) to give information on a point of their own law, are to be teased and insulted by such cross Interrogatories as ought only to be addressed to witnesses suspected of a desire to disguise or conceal the truth. That out of respect for the persons by whose signature these additional Interrogatories have been sanctioned, and ignorant of the customs and usages of the courts in which they practise, he has given such answers as occurred to him; but as the same inducements do not occur in favor of the further additional Interrogatories, he declines making any answer whatever to them.

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ANDREW RAMSAY, Esq.

ANDREW RAMSAY, Esq. of Whitehill, Advocate, aged sixty-seven years, a witness produced and sworn, deposes and says, that he has practised as an Advocate before the Supreme Court of Session in Scotland, since 1763, and that he acted as one of the Commissaries in the Commissary Court of Edinburgh, which is the Consistorial Court of Scotland, from 1774 till 1807; and further, to the eleventh article of the said libel he deposes and says, that he has attentively perused and considered the several exhibits annexed to the libel, and that marriage, by the law of Scotland may be constituted in several modes, without regular celebration by a clergyman. It may be formed by acknowledgment of the parties containing words *de præsenti*, relevant by that law to infer marriage; by promise attended with copula betwixt the parties; and by acknowledgements in writing, clearly expressing the fact that a marriage had been formally contracted. Deposes, that he is clearly of opinion that in the present case, all of these grounds for constituting marriage, by the law of Scotland, concur. There is an acknowledgment by the parties, containing words *de præsenti*, relevant by the law of Scotland to constitute a marriage. There is an acknowledgment in the letters of the defendant, by his signature as the plaintiff's husband, and addressing her as his wife, of his having formerly contracted a marriage with Miss Johanna Gordon the plaintiff. Deposes, that with regard to the

third

third ground, viz. promise and copula, the promise is here proved by the writing of the defendant in No. 1. of the Exhibits, he is also inclined to think from the letters of the defendant, that a copula has taken place betwixt the parties, and such is the impression which a careful perusal of the letters of Mr. Dalrymple has made upon his own mind. But the Deponent does not see in these letters, any sufficient evidence of a copula, upon which alone the sentence of a judge, declaring a marriage, can rest. But he conceives that from the style of the letters, the copula, as by the laws of Scotland it is clearly probative by witnesses, may be proved in that manner; and he should think it rather prudent for the plaintiff to strengthen her cause by bringing such proof. At the same time he is clearly of opinion, that without such proof, the eleventh article of the libel is well founded; and he does not see in what manner it can be avoided or defeated by any defence on the part of the Defendant.

ANDREW RAMSAY.

Examined on Interrogatories.

1. To the first of the said Interrogatories this Respondent answereth and saith, that he conceives that the law of Scotland, in regard to, the validity of irregular marriages, has been at all times the same, though not so definite or so well understood as it has been of late by some decisions in the Consistorial and Supreme Court.

2. To the second of the said Interrogatories this Respondent answereth and saith, that he has formed his opinion of what is the precise law of Scotland at the present day regarding such marriages, from the Roman law, which is the common law of Scotland; from the opinions of systematic writers, Lord Stair, Lord Bankton, and Mr. Erskine; and from the decisions of the proper Consistorial Court, which have either received the universal approbation of the country, or have been affirmed in the Supreme Court, and in the House of Lords.

3. To the third of the said Interrogatories this Respondent answereth and saith, that he considers a promise of marriage followed by a copula, or consummation, as equivalent in its legal effects to a marriage regularly celebrated, and not merely binding the party making it to marry at some subsequent period.

4. To the fourth of the said Interrogatories this Respondent

 answereth

ANDREW RAMSAY, ESQ.

answereth and saith, that an irrevocable obligation on the part of the man to marry a particular woman, when accepted of by the woman, is binding in all cases on the said woman, so as to prevent her from contracting a marriage with another man posterior to such obligation.

5. To the fifth of the said Interrogatories this Respondent answereth and saith, that a woman who has received an irrevocable obligation given by a man to marry her, is entitled to have her marriage declared by a decree of the proper court. The remaining part of the Interrogatory is too vague and indefinite to admit of a precise answer, but as relative to the situation of the parties, it has not suffered such alteration as to take away the woman's right to have the said marriage declared valid.

6. In answer to the sixth of the said Interrogatories this Respondent saith, that he conceives that the promise of a man to marry a particular woman, followed by a copula or consummation, taking place only in Scotland, will prevent the man from marrying another woman in England; such promise and such consummation will prevent the said man, although the said promise had not been previously insisted upon and declared binding at the woman's instance in the proper court in Scotland, and although the man had, at the time of such promise and such copula, been in England and not possessed of any property or effects in Scotland.

7. To the seventh of the said Interrogatories this Respondent answereth and saith, that where a man gives a declaration in writing to a woman, whereby he declares her to be his lawful wife, such a declaration, by the law of Scotland, constitutes a lawful marriage.

8th. To the eighth of the said Interrogatories this Respondent answereth and saith, that the law of Scotland has distinguished betwixt a copula or consummation, antecedent or subsequent to the declaration mentioned in a former Interrogatory. The copula and declaration must be inseparably connected, or in other words must be cause and effect; a copula after such declaration will render the marriage complete, but a copula before it will not have the same legal effect, because when these two take place, the law of Scotland presumes that the copula has taken place in consequence of such declaration. The declaration and copula when thus made out, constitute a marriage, and not merely an obligation to marry.

9. To the ninth of the said Interrogatories this Respondent answereth and saith, that where a man gives a writing to a woman, acknowledging that he is her husband, and the two parties

correspond with each other calling each other husband and wife, these facts by the law of Scotland will constitute a marriage, not merely an obligation to marry, unless it shall appear from real and undoubted evidence that no consummation had taken place between the parties, that they never had any serious intention of marriage, or that they have both resiled from it for reasons in which they both concurred.

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10. To the tenth of the said Interrogatories this Respondent answereth and saith, that he conceives that in the case stated in the former Interrogatory, the legal effect of the declaration and correspondence will not be avoided, although either the man or the woman express their doubts as to their being completely married, and signify his or their resolutions to marry publicly, or although one or both should express fears of being deserted by the other; because the mistakes or misconceptions of either of the parties, or their visionary terrors, will not alter the status which has been before fixed unalterably by their own acts and deeds, and constituting a valid marriage, and not merely an obligation to marry.

ANDREW RAMSAY.

Examined on the additional and further additional Interrogatories.

TO all and each of the said additional, and further additional Interrogatories, this Respondent answereth and saith, that in so far as they are pertinent and bear upon the case, they appear to him to be answered by the responses to the former Interrogatories, which in his opinion were framed with judgment, and a deliberate consideration of the facts as appearing from the Exhibits referred to by the Plaintiff, and exhausted the question which is before the Court; and that these additional and further additional Interrogatories, seem to be framed for the sole purpose of puzzling, perplexing, and rendering the cause inextricable, by holding it forth as resting on subtle questions of law, and a variety of decisions in former cases of marriage, which appear to him totally inapplicable to the case in hand. That having already given his evidence in chief, and answered the Interrogatories put to him by the Defendant to the best of his ability, he does not consider it as any part of his duty to answer these additional and further additional Interrogatories, because he conceives that he has fully discharged his duty as a witness and a counsel, by opinion and pointed responses to the former Interrogatories, which in his opinion contain whatever is material to the decision of the cause.

ANDREW RAMSAY.

7th August 1809.

On the ALLEGATION and EXHIBITS given on behalf of Mr. DALRYMPLE.

31st October 1810.

JOHN CLERK Esq. of the city of Edinburgh, Advocate, and for some time his Majesty's Solicitor General for Scotland, aged about fifty-three years, a Witness produced and sworn,

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DEPOSES and says, That he has practised as an Advocate before the Supreme Court of Session in Scotland since the year 1785, and to the seventh article of the said Allegation, the Deponent having attentively and deliberately perused and considered the several articles of the said Allegation with the Exhibits annexed thereto, and also the Libel given in the said Cause on the part of Johanna Dalrymple the Promoter, and the original Exhibits, Nos. 1, 2, 10, and 11, and the several original Letters annexed to the said Libel, he deposes and says, That in his opinion a person not having resided in Scotland otherwise than as being quartered there as a military officer, is not through such residence a domiciled resident. That the laws and usages of Scotland apply generally to persons actually resident within the country who contract marriages according to the methods and forms that would be binding upon the domiciled inhabitants, but that in cases where a marriage is alleged to have been contracted without having been solemnized in the face of the church, and the question depends upon evidence of consent to the matrimonial contract, persons who are not domiciled residents may be in a different situation from the domiciled inhabitants. There may be acknowledgments or declarations of marriage intended merely as engagements to marry at some future period, or where the parties live together publicly, to give their connection a more decent and respectable appearance in the eyes of the world. Such cases occur in Scotland, notwithstanding the danger to parties of being entangled in marriages without their consent by the law, which admits of private marriages without the marriage ceremony, the acknowledgments or appearances of marriage being taken as evidence of it: but the Deponent has been informed that in England, where private acknowledgments of marriage without the ceremony do not bind parties to the matrimonial contract, and consequently it is safer to pretend the connection of marriage where it does not exist,

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exist, such pretended marriages are not unfrequently formed without an intention to marry, and particularly that this is a practice in the army. Thus when a regiment comes from England to be quartered in Scotland, the same habits continue among the officers and soldiers, who have women along with them who pass as their wives, though the connection is in reality of a more temporary nature. From this it should follow, that the same circumstances that would infer consent to marriage in a domiciled inhabitant in Scotland, would in fact carry no such inference along with it against an English officer or soldier following the habits of his country. Thus, though it cannot be said that these persons while they remain in Scotland are not subject to the same law that applies to others, they have some advantage in weighing the evidence of consent to marry, where it is alleged that they have contracted private or irregular marriages. That the Deponent is of opinion that the Paper-Writing, No. 1, does not amount to or constitute a marriage, as it is in its form a mere promise. The Letters annexed to the Libel do not amount to or constitute a marriage, but they may be considered as important evidence in support of an allegation that a marriage had been contracted by the parties; the Deponent does not, however, consider them to be decisive evidence. Some of them are written in Scotland and others in England; the Deponent cannot distinguish between these letters as to their effect in evidence from the place where they were written; a letter written in England may afford material evidence, but it would not constitute a marriage; and the letters written in Scotland have, in the Deponent's opinion, no stronger effect than if they had been written in England. The Paper-Writing, No. 11, seems to have been an envelope, and the words of it "sacreed promises and engagements," to which the parties appear to have put their initials, import that when it was written there was no marriage between them, but only promises and engagements to marry. The Paper-Writing, No. 2, imports a mutual declaration of marriage by John Dalrymple and Johanna Gordon. If these declarations are in the handwriting of the parties, they afferd very important evidence in support of the Allegation that a marriage had been contracted between them; and laying out of consideration the acknowledgment to which there is the signature of "J. Gordon," if the previous declaration and signature is of the handwriting of Mr. Dalrymple, it is evidence against him of a very high nature that he had contracted a marriage with Miss Gordon. But the Deponent does not consider that the Paper-Writing, No. 2, though of the handwriting

 of

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of the parties, amounts to or constitutes a marriage, It is only evidence to prove the fact that a marriage had been contracted between the parties: It is not conclusive evidence, but only such as must be weighed along with the other circumstances of the case, and it will have more or less effect according to these circumstances. The Paper-writing, No. 10, contains a declaration subscribed "J. W. H. Dalrymple," that Johanna Gordon is his lawful wife, and that he shall acknowledge her as such the moment he has it in his power; and on the other hand, a promise by "J. Gordon now J. Dalrymple" that nothing but the greatest necessity shall force her to declare this marriage. This Paper is also subscribed "Charlotte Gordon, witness." It imports little more than the Paper-Writing, No. 2; if the first part of it is written and subscribed by Mr. Dalrymple, it is important evidence against him to prove the fact that a marriage had been contracted between the parties; but the Paper-writing does not amount to or constitute a marriage, it is only evidence which will have more or less effect according to the circumstances of the case; and upon the whole the Deponent is of opinion that the Paper-Writings, No. 1, No. 2, No. 10, and No. 11, and the Letters annexed to the Libel, do not amount to or constitute a marriage by the law of Scotland, though if those parts of the writings bearing to be promises and declarations by Mr. Dalrymple are with the signatures of his handwriting, they are very important evidence against him to prove that a marriage had been contracted. The Deponent considers that in general such evidence is so strong, that it lays the *onus probandi* upon the party against whom it is brought, who may still, notwithstanding such writings, be able to show from other facts and circumstances that no marriage was contracted. But in order to be aware of the full effect of these writings by the law of Scotland, it is necessary to take notice that if such a case were to be tried in Scotland, the Deponent is of opinion that the interest of the wife whom Mr. Dalrymple afterwards married in England according to the rules of the church, would be considered, and she would be made a party to the proceeding upon which the evidence adduced by Miss Gordon would be weighed, not only as to its effect against Mr. Dalrymple, but as to its effect against his wife, who would not be deprived of her *status* but upon evidence competent and sufficient against her. And the Deponent is of opinion that the Paper-writings referred to would have had in the courts of Scotland a much greater effect against Mr. Dalrymple, if he had remained unmarried, than they would have had in the question with him after his marriage in England. The Deponent holds

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holds this opinion upon the general principles of the law of Scotland, but he shall refer to two decided cases which tend to confirm it. In the case of Campbell against Cochrane, which is reported in Falconer's Collection, 28th July 1747, it was alleged that John Campbell of Carrick had made a private marriage with Magdalen Cochrane, and had afterwards married another lady; after his death Magdalen Cochrane claimed the character of his widow; but as she had connived at the second marriage, the Court of Session would not allow her to prove her allegations. Falconer's Report goes no further; but it appears from appeal cases upon which the House of Lords gave judgment, 31st January 1753, that the decision of the Court of Session had been reversed of consent in the House of Lords, and Magdalen Cochrane was accordingly allowed to prove her case. The cause was decided against her upon the proof, and the judgment was affirmed in the House of Lords, as appears from a copy of the judgment which the Deponent has seen upon one of these appeal cases. In the Deponent's opinion, the evidence for Magdalen Cochrane would have been sufficient against Campbell the husband, but it was not sustained against the Lady whom he married publicly after having made what was said to have been his first marriage. And in another case, Napier against Napier, not reported, which was decided by the Court of Session about the year 1802, in which case the Deponent was employed as counsel, there was evidence, which, in the Deponent's opinion, would have been sufficient to prove a first marriage against the man, but which however was not sustained against his family by a second wife. The man was a native of Scotland, and, as the Deponent believes, of Glasgow; he enlisted as a soldier at an early period of life, the first woman followed him, and it appeared from the evidence that she had lived with him as his wife along with the regiment. In the present case the Deponent is of opinion that the writings referred to, supposing that they would have been sufficient evidence against Mr. Dalrymple, if he had remained unmarried, to prove that he had contracted a marriage with Miss Gordon, would not have been sufficient evidence in a question with Mr. Dalrymple's wife, as a party in the proceeding, which would have taken place if the question had been tried in Scotland, to prove that a marriage had been previously contracted with Miss Gordon; so that according to the Deponent's opinion of the law of Scotland, the second marriage is a most important circumstance in considering the evidence of the first marriage. But the Deponent is further of opinion, that the letters and writings lose a great deal of their weight from

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from another circumstance, that though the import of the writings is that the parties were married, yet the fact appears to have been that no marriage ceremony was performed either in the face of the church, or privately between the parties. But the Deponent is of opinion, that according to the law of Scotland something more is necessary to the constitution of a marriage than mere declarations in writing that the parties are married; and though such writings may afford strong evidence that a marriage was contracted, they are not sufficient *per se* to constitute a marriage. If the parties trusted entirely to these writings, not merely for the evidence but for the formation or constitution of their marriage, the Deponent is of opinion that they did not do that which was necessary by the law of Scotland to constitute a marriage; and though they had consented to marry, they did not thereby become married persons, but only formed a contract from which either party was at liberty to resile or draw back as in the case of imperfect obligations. The Deponent holds this opinion upon the general principles of the law of Scotland which have been applied in various decided cases, and more particularly in the case of M'Lauchlane against Dobson, 6th December 1796, reported in the Faculty Collection; a decision which the Deponent has always regarded as of the highest authority. The Deponent strongly rests upon the opinion delivered by the Lord Justice Clerk M'Queen upon that case. He believes it to be universally acknowledged by the profession, that the opinions of that judge are of as much weight in questions of law as the opinions of any other judge or lawyer that has appeared in Scotland. The Deponent has seen the notes of his opinion in the handwriting of the Honourable Henry Erskine, formerly Lord Advocate of Scotland, who was a counsel in the cause, and which are in these words:—
" The case of M'Lauchlane against Dobson new, but the law is
" old and settled; two facts admitted *hinc inde*, no celebration, no
" *concubitus*, nor promise of marriage, followed by copula. Contract
" as to land not binding till regularly executed, unless where *res non*
" *sunt integræ*; a promise without *copula*, *locus penitentiæ*, even
" verbal consent *de præsenti* admits *penitentiæ*. Form of con-
" tracts contains express obligation to celebrate, till that done
" either party may resile. Private consent is not the *consensus*
" the law looks to. It must be before a priest, or something equi-
" valent; they must take the oath of God to take each other; a
" present consent not followed with any thing may be mutually
" given up, but if so, it cannot be a marriage." Further the Deponent is of opinion that between a man and woman domiciled in Scotland

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Scotland such promises, acknowledgments or declarations as are contained in the paper-writings and letters in this question, would not amount to or constitute a marriage, though the Paper-Writing marked No. 10 had been signed in the presence of a witness competent by the law of Scotland to attest and prove the same, but that such writing would only be evidence of more or less weight according to circumstances, that a marriage had been contracted. And further, the Deponent is of opinion that if the promises, acknowledgments, and declarations contained in the paper-writings and letters already referred to, do not amount to or constitute a marriage, or do not, as evidence, along with the other evidence to be had in the case, prove that a marriage had been contracted between the parties, they cannot amount to more on the part of the man than an obligation to solemnize a marriage in the face of the church at some future time, provided he should be duly called upon by the woman so to do, and there should be no legal impediment to the marriage. Deposes, that the most obvious view of these writings is that they contain admissions express or implied in point of fact that the parties were actually married, and such admissions in the handwriting of Mr. Dalrymple are evidence against him stronger or weaker according to the circumstances of the case, that the fact so admitted was consistent with the truth: but that the Paper-Writings, No. 2 and No. 10, may be considered as having been intended to make and constitute a marriage *de præsenti*; and if these writings are sufficient evidence that such was the concurring intention of the parties when they were delivered, a question in law arises in which the Deponent has reason to believe that different and opposite opinions are entertained by Scottish lawyers. It is commonly stated as a general rule of law, that marriage may be constituted by consent alone, and in arguments upon this subject it is commonly said, that *consensus non concubitus facit matrimonium*. The Deponent is of opinion, that in the application of these rules it must be understood that the consent intended by them means a consent to some *habilis modus* of constituting a marriage, which leaves the question behind, whether that which parties have consented to was a *habilis modus* or not. The Deponent is of opinion that the writing and delivering of the paper-writings in this case was not *per se habilis modus* of constituting marriage, and would not have had the effect of making a marriage between the parties, even though the writings were to be considered as evidence that the parties had intended them for the purpose of constituting a marriage. But the Deponent believes that an opposite opinion is entertained

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entertained by some lawyers who hold, that as a marriage may be constituted by consent alone, any intelligible form of expressing consent will make a marriage. This opinion seems to have had much influence with the court in the case of Walker against M'Adam, 4th March 1807, reported in the Faculty Collection. In that case the man declared the woman to be his wife before several witnesses, for the purpose, as it appears, of constituting a marriage *de præsenti*; in the course of the same day he shot himself with a pistol, so that the marriage was left *in nudis finibus contractus*, no copula or cohabitation having followed it; this however was sustained as a marriage by the court; the decision has since been appealed from to the House of Lords, and in the Deponent's opinion it was erroneous in law, in so far as the declaration before witnesses was sustained *rebus integris* as the constitution of a marriage. The Lord President, Sir Ilay Campbell, whose opinion as a lawyer is of the greatest authority, was against the decision, and the appeal remains yet undetermined. The Deponent is further of opinion, that if the paper-writings now in question are not considered as evidence that it was the concurring intention of the parties at the time to make and constitute a marriage *de præsenti*, by means of these writings, there can be no doubt that they do not constitute a marriage, for the consent necessary to the constitution of a marriage must be consent to a marriage *de præsenti* by both parties at the same time: if marriage is not completed at the moment, there is no marriage constituted by the suppposed act of consent: thus if a man were to write such declarations as those referred to, and were to send them to a woman in a post letter, this would not constitute a marriage, though it would afford evidence that a marriage had antecedently been constituted. The Deponent thinks it is very clear that the writings created an obligation upon Mr. Dalrymple to marry Miss Gordon, but the question is whether they did nothing more. The Deponent is of opinion, that the words before the signature of J. Dalrymple in the Paper-Writing, No. 2, are in sufficient form to express consent *de præsenti* to marriage, and so are the words before the signature of J. W. H. Dalrymple in the Paper-Writing, No. 10, and that in so far there was a *habilis modus* of contracting a marriage. But though the words may be sufficient, the act of marriage may not be completed. If the act of consent necessary to marriage is only inchoated or begun, without being completed, there is no marriage; and the Deponent is of opinion that the most direct expression of consent is not sufficient to make a marriage, unless the parties

either

either go through the marriage ceremony, or, after expressing their consent, complete the marriage by consummation. And further, that supposing a marriage could be constituted without either ceremony or consummation, and by mere verbal expressions of consent, yet if the words are not used *eo intuitu* of making and constituting a marriage *de præsenti*, they are ineffectual, and the same is the case if the other party does not join in expressing the consent to marriage *de præsenti*. The consent on both sides ought to be unequivocally expressed, and at the same time; and it seems to be necessary that it shall create a belief in both parties that they are actually married, and that no further ceremony is necessary to unite them; for though their mutual professions should be very strong, they may still think that something more is necessary to constitute a marriage, as in the case of a man and woman who propose to marry, and previous to the ceremony sign their marriage settlements, which, in Scotland, usually contain words whereby the parties *per verba de præsenti* accept of one another as man and wife: the words are as strong as those employed by the parties in this case, and yet they do not consider themselves to be married. They have only signed their contract of marriage, which is no more than an obligation, and both parties have it in their power to retract. The common clause in contracts of marriage to which the Deponent has alluded is in such words as the following, "The said parties have accepted "and do hereby accept of each other for lawful spouses, and "they promise to solemnize the bond of marriage with all con-"venient speed, according to the rules of the church." The writing with this clause in it, though executed with great formality in the presence of witnesses, and very frequently in the presence of a number of their nearest relations, never was held to constitute a marriage; the intent is only to create an obligation, and the writing has no further effect. For the same reason the writings in this case may have no other effect than that of creating an obligation to marry, though they are obviously very different from common contracts of marriage, in executing which the parties never suppose that they are constituting a marriage.

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8. To the eighth article of the said Allegation he deposes and says, that in his opinion, supposing a marriage had not been contracted by the parties, and that Mr. Dalrymple had only come under an obligation to marry Miss Gordon, such obligation must necessarily have been defeated by his subsequent marriage, and could not operate so as to void the subsequent marriage. But on the other hand, supposing a marriage had been contracted between

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between Mr. Dalrymple and Miss Gordon, no omission or neglect on her part would void such previous marriage, and the subsequent marriage would be void and null.

9. And to the ninth article of the said Allegation he deposes and says, that in his opinion, if the writings are of the handwriting of Mr. Dalrymple, they are probative without the attestation of witnesses: if they are not of his handwriting, but are subscribed by him, and this is admitted or proved, their effect may be doubtful; but the Deponent is of opinion that even in that case they would be probative as declarations or acknowledgments of a fact; for example, that the parties had been married: but they would not be probative as contracts or obligations, and the Deponent is of opinion that they would not be probative as agreements to marry *de præsenti*. Further, the Deponent is of opinion, that the natural and lawful sister of the woman party may not be received as a witness in her behalf to prove contracts, acknowledgments, or agreements of the nature of the aforesaid Paper-Writings, as it was decided in the case of Dalziel against Richmond, 10th July 1790, reported in the Faculty Collection, that the sister of a person in a declarator of marriage was inadmissible as a witness for her; and though some older authorities are against that decision, the point thereby decided is now considered as established law. Further, the Deponent is of opinion that by the laws of Scotland women are not habile witnesses to written instruments, and he is of opinion that the attestation of Charlotte Gordon adds nothing to the authenticity of the Paper-Writing, No. 10.

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Examined on Interrogatories.

1. To the first of these Interrogatories this Respondent deposes and answereth, that in the case put, the marriage would be effectual by the law of Scotland.

2. To the second Interrogatory the Respondent deposes and answereth, that the question whether marriage may be constituted between parties in Scotland by promise and subsequent copula, was decided in the affirmative in the case of Pennycook against Grinton and Graite, 15 Dec. 1752, reported in the Faculty Collection; in reference to which case it is said by Lord Kaimes, in his Elucidations respecting the Law of Scotland, article 5, p. 39, that the judges were almost unanimious that a promise *cum copulâ* makes a complete marriage; and Mr. Erskine in his Institutes,

B. 1.

B. 1. tit. vi. § 4, lays down the doctrine in the strongest terms, that a copula subsequent to a promise of marriage constitutes marriage by the law of Scotland. But the Respondent is of opinion that there are very weighty objections against the doctrine, some of which are stated by Lord Kaimes, in the article of the Elucidations before mentioned; and the Respondent is of opinion that the doctrine was not allowed in the practice of the Scotch courts till the before-mentioned case of Pennycook. Further, if a case of the same nature were to occur now in Scotland, in which there had been a promise of marriage followed by a copula, and the woman had taken no legal measures to have the marriage declared, till after a second marriage in *facie ecclesiæ* between the man and another woman, the Respondent thinks it not altogether clear that the Scotch courts would annul such second marriage, though he is of opinion that they would annul it, out he should in such a case advise an appeal to the House of Lords against the judgment, with considerable expectations of success, upon what he considers to be the true principles of the law of Scotland. And the Respondent further deposes and answereth, that the question whether marriage may be constituted between parties in Scotland by solemn, verbal, or written declaration of consent *de præsenti*, with equal effect in point of validity as it may by a celebration in *facie ecclesiæ*, is not precisely settled by authorities and decisions; and the Respondent has already given his opinion upon this subject in his deposition in chief, and the Respondent has also given his opinion as to the effect of the legal domicile or place of residence of the parties in question as to the constitution of marriage within Scotland.

3. To the third Interrogatory the Respondent deposes and answereth, that the marriages celebrated at Gretna Green, and other places in Scotland, between persons domiciled in England and recently arrived from that country, have generally been considered as effectual marriages by the law of Scotland; though the Respondent has frequently heard doubts expressed with regard to their validity. But this he considers to be a question rather in the law of England than in the law of Scotland, where the parties continue their domicile in England immediately after their marriage. If the parties were to reside in Scotland after their Gretna Green marriage, the case would resolve into that of a common irregular marriage. In the case of Wyche against Blount, 27th June 1801, it was substantially found that a Gretna Green marriage between English parties, who had returned to England immediately after the celebration, was effectual.

4. To

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4. To the fourth Interrogatory the Respondent deposes and answereth in the negative.

5. To the fifth Interrogatory the Respondent deposes and answereth in the affirmative as to the effect of a regular marriage celebrated in the face of the Scottish church; and as to the remainder of the Interrogatory the Respondent deposes and answers, that he refers to his opinion already given. And further deposes and answereth, that in his opinion, a Scottish woman and an English officer quartered with his regiment in Scotland, contracting an irregular marriage, are subject to the same laws that apply to the domiciled inhabitants.

6. To the sixth Interrogatory the Respondent deposes and answereth, that supposing a promise or obligation to marry followed by a copula, does, according to the law of Scotland, constitute a marriage, he knows of no case in which the parties are absolutely bound to fulfil an obligation to marry. But on that supposition they may in all cases resile from such obligation, being liable only to a claim of damages for breach of engagement. But if, on the other hand, a promise or obligation to marry, followed by a copula, does not constitute a complete marriage, the Respondent is of opinion that in such a case the parties, at least the man, could not resile from the obligation, although the effect of such obligation might be defeated by another marriage as a mid-impediment.

7. To the seventh Interrogatory the Respondent deposes and answereth, that Lord Stair's Institutes is a work of very high authority in the law of Scotland, though some of the opinions contained in it are erroneous: and as to the doctrine laid down B. 1. tit. iv. § 6, referred to in the Interrogatory, the Respondent deposes and answers, that he holds it to be correct under the limitations which will appear from former parts of his deposition, and that it has been recognized as the existing law of Scotland in some cases, apparently without limitation, but in other cases under limitations which appear to confirm the opinions which the Respondent has already given upon this subject.

8. To the eighth Interrogatory the Respondent deposes and answereth, that Erskine's Institutes is one of the latest institutional works of authority on the law of Scotland, though some of the opinions contained in it are erroneous: and as to the doctrine therein laid down, B. 1. tit. vi. § 5, the Respondent is of opinion that it is not recognized as the undoubted existing law of Scotland; that in the last edition which the Respondent has seen of Erskine's Institutes, published in 1805, there is a note which

seems to the Respondent to refer to the doctrine in these words: "From the later decisions of the court there is reason to doubt "if it can now be held as law, that the private declarations of "parties, even in writing, are *per se* equivalent to actual celebra-"tion of marriage." And the Respondent does for himself consider the doctrine to be incorrect, and he refers to former parts of his deposition for his opinions with respect to it.

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9. To the ninth Interrogatory the Respondent deposes and answereth, that in his opinion the doctrine was recognized and allowed by the decision of the Court of Session, in the case of Taylor against Kello, 16th February 1786, but that decision was reversed in the House of Lords, and though the reversal was upon special grounds, for which the Respondent refers to the terms of the judgment, he does not consider that the doctrine was thereby recognized: Further deposes and answereth, that in his opinion the doctrine was not recognized by the decision of the Court of Session in the case of Inglis against Robertson, 3 March 1786, as it appears to the Respondent, though the report in the Faculty Collection wants precision, that it was a case of long intercourse during which the parties had carnal communication, and it is said that the Defender in his defence did not deny *concubitus*; and upon the whole, the Respondent thinks that the decision does not apply to the doctrine of Mr. Erskine, cited in the eighth Interrogatory: Further deposes and answereth, that his information with respect to the case Callender against Boyd, decided in 1801, but which does not appear to have been reported, is so slight that he does not think himself entitled to give any opinion upon that decision as an authority: Further deposes and answereth, that the decision in the case of Edmondstone against Cochrane, 15th May 1804, does not recognize the doctrine, as that was a case in which a copula followed the obligation to marry, or declaration of marriage; and though it is stated in the report that the Court in general held that a written acknowledgment *de præsenti* was sufficient to constitute marriage, and the Interlocutor of the Lord Ordinary which the Court adhered to, apparently rests upon the consent of parties to constitute a marriage *de præsenti* without referring to the copula; yet the Respondent without other information respecting the case than what is contained in the report, cannot suppose that the Court overlooked the very material circumstance of the copula, which would have been sufficient with a bare promise to bind the man to marriage, even although it were to be supposed that a declaration of marriage *de præsenti* did not constitute a complete

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marriage, or that a promise of marriage with a subsequent copula did not constitute a complete marriage; but in either case that the *obligation* was by the subsequent copula rendered so binding as that the man could not resile from it, though if there had been a *medium impedimentum* it might have been defeated: but upon the evidence of the report the Respondent is of opinion that it is at least highly probable that some such general doctrine as that laid down by Mr. Erskine in the eighth Interrogatory was on that occasion laid down by the judges.

10. To the tenth Interrogatory the Respondent deposes and answereth, that as to the effect of solemn written declarations of consent *de præsenti* to marriage, he refers to what he has already deposed to; and as to the reversal of the judgment in Taylor against Kello, by the House of Lords, he is at a loss to find any general declaration of law expressed or implied in the judgment, further than what may be implied in its being found that mutual express declarations and acknowledgments of marriage in writing were ineffectual to constitute a marriage, in the circumstances of that case, wherein it appeared to the House of Lords that the parties did not intend or understand the writings as a final agreement, nor was it so intended or understood that they had thereby contracted the state of matrimony, or the relation of husband and wife from the date thereof. The facts stated in the report of the case in the Faculty Collection, and in the Appeal Cases which were before the House of Lords, leave it uncertain what will be sufficient in the circumstances of a case as a ground for finding that the most direct and unequivocal declaration of marriage in writing was not a final agreement, nor so intended, or understood that the parties had thereby contracted the state of matrimony or the relation of husband and wife from the date thereof: but the Respondent is of opinion that unless it had been held in that case by the House of Lords, that the mutual declarations of marriage were not sufficient to prove the constitution of a marriage without consummation, or without something further done by the parties in pursuance of the agreement thereby declared, the judgment would not be consistent with any hypothesis he is acquainted with as to the law of Scotland with respect to marriage, and this opinion he has formed upon considering the facts of that case as they are stated in the report of the Faculty Collection and in the Appeal Cases.

11. To the eleventh Interrogatory the Respondent deposes and answereth, that he refers to the former parts of his deposition upon the subject of the Interrogatory.

12. To the twelfth Interrogatory the Respondent deposes and answereth, that he is of opinion that it was decided in the case of M'Adam against M'Adam, 4th March 1807, that a verbal declaration of marriage made before witnesses, was sufficient to constitute a marriage, but the Deponent never heard of any other case, in which, according to his opinion, it was decided that a bare declaration of marriage without the ceremony of marriage performed by a clergyman, or by some person taking upon him the functions of a clergyman, was, while matters remained entire and *in nudis finibus contractus*, sufficient to constitute a marriage; and the Respondent refers to what he has already deposed with respect to the case of M'Adam against M'Adam: And further deposes and answereth, that in his opinion the various writings annexed to the Libel in the present case, though they contain in words, sufficiently full and explicit declarations of consent *de præsenti* to marriage, and declarations as full and explicit as in the case of M'Adam; yet he is of opinion that in the case of M'Adam the declaration of marriage was attended with an apparent intention of immediate publication of the contract and acknowledgments to the world by the man or the woman as his wife, which, on the supposition that marriage may be perfected by mere consent, expressed by the parties, makes that a stronger case than the present, in which the expression of mere consent given by the parties was not attended with such acts, showing that it was their immediate intention to contract the state of matrimony.

13. To the thirteenth Interrogatory the Respondent deposes and answereth, that written declarations of marriage have not, so far as he knows, been enumerated by lawyers among the writings to which the solemnities of formal deeds are necessarily required by the law of Scotland, and the Respondent refers to a former part of his deposition upon this subject; and the Respondent further deposes and answereth, that he does not recollect of any case in which a writing was sustained as proof that a marriage had been contracted between the parties, where such writing would not have been probative according to the law of Scotland, in the case of any other contract or obligation.

14. To the fourteenth Interrogatory this Respondent deposes and answereth, that in a question of personal obligation the want of the solemnities required by law is of no consequence where the party judicially admitted that he wrote, signed, and delivered the writing, but where the party only signed the writing, and did not write it with his own hand, it is void and null without the solemnities where matters are entire and *in*

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nudis finibus contractus. The Respondent does not know that the point has occurred in a question of marriage where matters are not entire, but where some consideration has been given or something has been done by the obligee upon the faith of the deed, whereby his condition is rendered worse: the party who has signed the deed is bound by it, though it want the solemnities, and though he did not write the deed.

15, 16. To the fifteenth and sixteenth Interrogatories this Respondent deposes and answereth, that he refers to former parts of his deposition upon these subjects.

17. To the seventeenth Interrogatory the Respondent deposes and answereth, that the decision in the case of Pennycook against Grinton, 15th December 1752, determined that under the circumstances of that case the second marriage was null and void, and the Respondent is of opinion that this ought to be considered as a decision, that a promise of marriage with a subsequent copula does constitute a marriage to the effect of voiding any after marriage. And although Lord Kaimes seems to think that the irregularity of the second marriage in that case, so far as it proceeded without proclamation of banns, had weight with the judges; and seems to think that in a case where the banns of the second marriage have been regularly proclaimed, the second marriage would not be voided on the ground of a former connection in which there had been a promise of marriage *cum copulâ*. The Respondent is of opinion that there is no material distinction between the two cases, for the second was a valid marriage without proclamation of banns, and if so it could not be voided but by a previous marriage; and if there was a previous marriage the second must have been voided whether it was regular or not. And the Respondent refers to a former part of his deposition in regard to the case of Pennycook against Grinton, and with regard to the effect of a promise of marriage when followed by a copula. And the Respondent further deposes and answereth, that excepting in the case of Pennycook against Grinton, he does not know that the question ever was decided whether a promise of marriage given by a man to one woman and a subsequent copula with her, was sufficient to void an after marriage betwixt him and another woman. But the Respondent finds in Kilkerran's decisions or reports, which is a book of authority, p. 488, a reference to two cases from which it appears to the Respondent, that according to the opinion of the author, and according to the opinions which prevailed when those cases occurred, a promise of marriage with a subsequent copula did not constitute a marriage: Kilkerran's report, in which the reference is made, is of the case

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of Linning against Hamilton, decided 1st December 1749: This was an action of damages at the instance of a woman against a man for seduction or *stuprum fraudulentum*: The author says, "It was admitted that action might nevertheless lie *ex dolo*, had any fraud or deceit been used, and which was said to be the case in the only two decisions that are to be found upon record on this point, viz. Ker contra Hyslop, in 1696, and Castlelaw contra Agnew of Shenchan, as in both there was a promise of marriage; though in Ker's case Hyslop the man had in the interim married another, and so could not be decerned to adhere; and in Castlelaw's case the adherence was not insisted on by her, and Shenchan was rather willing to pay the 200*l.* sterling, which the Commissaries had decreed, and so the adherence, which is the proper decerniture on promises of marriage and subsequent copula, was in effect passed from by consent of parties." The case of Ker against Hyslop is reported by Fountainhall, vol. i. p. 728, and appears to have been decided on 15th July 1696; but the Respondent has obtained no further information respecting the case of Agnew.

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Additional Interrogatories.

1. To the first of these additional Interrogatories the Respondent deposes and answereth, that he is of counsel for the Defendant Mr. Dalrymple in this Cause, and has been professionally employed by him in conducting his defence, and that according to the best of his recollection since its first commencement.

2. To the second additional Interrogatory the Respondent deposes and answereth, that he gave his advice and assistance in preparing and framing the cross Interrogatories, on which the witnesses, produced for the Plaintiff, were examined in summer and autumn 1809, and according to the best of his recollection, he prepared some part of these Interrogatories, though he did not finally adjust or prepare them in whole.

3. To the third additional Interrogatory the Respondent deposes and answers in the affirmative.

4. To the fourth additional Interrogatory the Respondent deposes and answers, that he did advise the plea, that the Plaintiff's suit is barred by the Defendant's subsequent marriage with Miss Manners, and that he suggested that plea, though he does not

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recollect whether he was the first or only person that suggested it or not; and that he does not recollect whether he took it for granted, that the Plaintiff was in the perfect knowledge, that the Defendant had returned to Britain, and of his courtship of and intended marriage with Miss Manners, and rather thinks he did not take these circumstances for granted, or that they were much in his contemplation.

5. To the fifth additional Interrogatory this Respondent deposes and answers, that supposing the Plaintiff neither knew of the Defendant's return to Britain, but was induced to believe he was abroad, nor of his intended marriage with Miss Manners until it had actually take place, his opinion as to the present suit being barred by the subsequent marriage would be the same, that it is on the supposition that the Plaintiff was acquainted with these circumstances.

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13th November 1810.

DAVID CATHCART, Esq. of the city of Edinburgh, Advocate, aged forty-six years, a Witness produced and sworn.

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DEPOSES, that he has practised as an Advocate before the Court of Session in Scotland, since the year 1785, and to the seventh article of the said Allegation, the Deponent having attentively and deliberately perused and considered the several articles of the said Allegation with the Exhibits annexed thereto, and also the libel given in the said cause on the part of Johanna Dalrymple, the promoter, and the original exhibits marked No. 1, 2, 10, and 11, and the several original letters annexed to the said libel, he deposes and says, that he conceives a person domiciled in England does not become domiciled in Scotland who comes there without any will of his own, in consequence of orders with a marching regiment, and merely remains there with his regiment. As to succession the Deponent holds it clear that his domicile was not changed, although from his accidental residence his conduct must be subject to, and regulated by the law of Scotland while he resides there. The Deponent can entertain no doubt that such a person could lawfully contract a marriage according to the law of Scotland, but he thinks that in establishing a private marriage, the courts here in such a case would require much stronger

stronger evidence than might be sufficient to establish a marriage betwixt natives of this country, and he conceives that it would enter deeply into the consideration of the courts of this country, in determining a question of this kind, that the young man who granted the writings founded on, was not domiciled in this country, was a minor, incapable of entering into such a contract in England where he was domiciled; and they would attentively consider whether the words or expressions from which his consent to marriage was inferred, were of that nature and form, so as to leave no possibility of doubt as to his solemn intention to contract marriage, especially if matters remained entire: The Deponent is of opinion, that between a man and a woman domiciled in Scotland, according to the law of Scotland such persons never having had carnal copulation together, upon the faith of, or subsequent to any promise, acknowledgment, or declaration of marriage, and they never having lived or cohabited together as husband and wife, or been reputed as such, by their relations, neighbours or acquaintances and others, such pretended promise, acknowledgment, or declaration as are contained in the writings marked No. 1, 2, 10 and 11, and the letters annexed to the libel, although the same had been preceded by a carnal copulation, do not amount to or constitute a valid or effectual marriage legally binding on either of the said parties; and matters being entire, he apprehends it was in the power of either of them to resile. The Deponent will explain what he understands to be the law of Scotland with regard to marriage. By our ancient law, and by the canons of the church of Scotland, vide Canons of the Church of Scotland in 1242, published by Lord Hailes, celebration of marriage *in facie ecclesiæ* was indispensable. This unquestionably continued to be the law of Scotland till the Reformation, when marriage continued to be celebrated by clergymen who had been deprived of their functions. The difficulty of proving solemnization at a great distance of time, gave rise to the Statute 1503, ch. 77, which introduced a presumption that if the marriage had not been objected to in the life-time of the man, it should be sufficient to obtain possession of the terce, that the woman was by habit and repute the man's lawful wife during his life-time. "By and while it be clearly decerned and sentence given that she was not his lawful wife." It is clear, therefore, that cohabitation as man and wife was not held as sufficient to constitute marriage, it was only held to afford a presumption that a marriage had been solemnized between the parties, unless the contrary had been proved, vide Sir George Mackenzie's observations, p. 114.

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In the same way, the Act 1551, ch. 19, Anent Bigamy, demonstrates, that a marriage could only be constituted by celebration *in facie ecclesiæ*. The law, therefore, had no idea of any other marriage, and Sir George Mackenzie remarks, marriage is contracted with us, *per hieralogiam*, or *benedictionem ecclesiæ et ante coitum*. In the same way after the Reformation, although marriage was no longer a sacrament, yet celebration by a Minister after the proclamation of banns was held to be essentially requisite: This is established by the first book of discipline in 1560, (vide Archbishop Spottiswood's Church History, b. i. p. 172), by the directory of worship, in 1643, by the Acts 6 and 7 of Assembly 1690, and Act 15 of Assembly 1715; in short, the whole of our Statutes not only hold the solemnization of a marriage by a Clergyman as necessary, but punish with severity Clergymen not authorised by the church as then established, who should attempt to celebrate marriage. By the statute 1641, ch. 8, revised by Statute 1661, ch. 34, it was enacted that whoever shall marry in a clandestine way, or procure themselves to be married by Jesuits, Priests, or any others not authorised by the kirk, shall be imprisoned for three months and shall pay very high fines, and that the celebrator of such marriage shall be banished the kingdom, never to return therein, under the pain of death.

At the time these Statutes passed, no idea had ever been entertained that persons declaring their consent to marry *de præsenti*, was as effectual a marriage as could be celebrated by a Clergyman, without any thing whatever having followed upon it; such a declaration might afterwards produce that effect by consummation and cohabitation as man and wife, either in virtue of the Statute 1503, which secured her terce to the widow, who had cohabited with and lived with her husband as his wife, without their marriage being challenged during his life; or from matters not being entire, the one party might have a claim upon the other to solemnize marriage, and which might be enforced by the Commissary Court, according to a case stated by Craig, lib. ii. dieg. 18 and 29. By the Statute 1698, ch. 6, it was enacted that persons clandestinely or irregularly married, contrary to the Act 1661, shall be obliged to declare the name of the person who celebrated the same, and of the witnesses, under a very heavy penalty and imprisonment, and the celebrator is declared to be liable to be summarily seized, and to be punished by perpetual banishment, and such pecunial or corporal pains as the privy council should think fit. These Statutes, therefore, appear altogether

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together absurd, if celebration by a clergyman, or by some one assuming the functions of that office, had not been conceived necessary to constitute marriage by the law of Scotland; and the Deponent is not acquainted with a single instance in which it has been ultimately decided, in Scotland, that the bare declaration of parties without celebration, *rebus integris*, ever had the effect of constituting marriage, unless the case of M'Adam against M'Adam, (14th March 1807,) in which a great difference of opinion prevailed in the Court of Session, shall be held as of this description, but that case is not yet finally decided, being under appeal, and is totally different from this, as there Mr. M'Adam having lived with a woman by whom he had two children, summoned all his servants, and taking her by the hand in their presence, declared her his lawful wife, and the children his lawful children, and to which the lady seemed to assent, and was congratulated upon the marriage by many persons, and in the course of the same day Mr. M'Adam shot himself. Here there was a public declaration of marriage *de præsenti* before a number of witnesses, which rendered it public and notorious, and he had never resiled from that declaration of marriage; whereas, in the present case, according to the statement given, the writings founded on were altogether latent and known to no person but themselves, and were solely in the custody of the lady. The Deponent apprehends that many cases have occurred in Scotland where the acknowledgments or declarations of marriage by the parties were stronger than those made use of in this case, and where, from their having been no cohabitation afterwards as man and wife, these declarations in words *de præsenti* were not held sufficient to constitute marriage, that is to say, that until cohabitation had barred the power of resiling, each of the parties might resile. In the case of M'Lauchlane against Dobson, (6th Dec. 1796, Supplement to Dictionary) a long correspondence by letters, in which the parties styled each other husband and wife, followed by a verbal declaration of marriage before witnesses, was held insufficient to constitute a marriage where there was no consummation; for although in this country there are no precise forms which are indispensable in the solemnization of marriage, yet *rebus integris* it can only be constituted by a consent adhibited in the presence of a clergyman, or in some other solemn mode equivalent to actual celebration. In that case at least thirty letters had been written by Dobson to the lady, addressed to her as his wife, and subscribed her affectionate husband, and he had even written letters to her mother and sister, addressed to the first in the character

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racter of his mother-in-law, and the latter his sister; the lady had in the same manner subscribed herself his affectionate wife, and even by the name of Helena Dobson; and at a meeting of her relations Dobson did there publicly acknowledge and declare Helena M'Lauchlane to be his married wife, and she on her part declared him her lawful husband: although the Commissaries in an action at the instance of the lady against Dobson, declared the marriage, yet the Court of Session altered that judgment. In that case it was expressly laid down by Lord Justice Clerk M'Queen, (certainly one of the highest authorities upon the law of Scotland) "that consent *de præsenti* admits *penitentiæ*; private consent "is not the consent the law alludes to, it must be before a priest "or something equivalent, they must take the oath of God to each "other, a present consent not followed with any thing may be "given up, but if so, it cannot be a marriage." And this reasoning had great weight with the bench. In the case of M'Innes against More, the declaration of marriage, which was by a holograph writing in words *de præsenti*, (20th Dec. 1781), was found not to be sufficient to constitute marriage. The decree of the House of Lords declared, "that the written acknowledgment is "not sufficient proof of any marriage having passed betwixt the "pursuer and defender." In that case, a consent or declaration of marriage *de præsenti* was established, but this was not found sufficient to prevent More from resiling, as matters were entire from that period, no cohabitation having taken place. In the case of Taylor against Kello (16th February 1786), the parties had interchanged and delivered to each other mutual missives in the following terms: "I hereby solemnly declare you, Patrick Taylor, in Birkenshaw, my just and lawful husband, and remain your affectionate wife, Agnes Kello." There was thus the most complete legal evidence of mutual declarations of marriage *de præsenti*. The Commissaries found this to be a marriage; the Court of Session confirmed the judgment, but it was afterwards reversed upon appeal: no doubt different cases might be mentioned, where similar writings have been held sufficient to constitute a marriage, but then in all these cases consummation or cohabitation as man and wife had followed. Thus in the case of M'Kie against Ferguson, 1782, both parties in the presence of witnesses declared before God and man, that they took each other for man and wife, and they accordingly undressed and went to bed, where they remained *nudus cum nudâ*, with the door locked for a considerable time; the Commissaries, 4th Jan. 1780, "found facts, circumstances, and qualifications proven,

"sufficient

"sufficient to infer a marriage betwixt the parties," and this judgment was confirmed. In the same way in the case of Cochrane against Edmonstone, (1802), although there was a private declaration of marriage in words *de præsenti*, yet this was also followed by consummation, as Edmonstone admitted that he slept with the lady the night after he had given her the letter, and their cohabitation as man and wife continued for some time afterwards. Further, all contracts of marriage which are subscribed in the most solemn and formal manner, contain a consent *de præsenti*, the parties thereby "accept and take each other "for lawful spouses," with an after declaration to solemnize the marriage in face of the church. Yet it has always been held, that these declarations of marriage made *de præsenti* do not constitute marriage, but that it is in the power of either of the parties to resile; and even when this solemn contract was fortified by penalties, it has been found that there was still a power of resiling, *rebus integris*, 25th Jan. 1715, Young against Irvine and Anderson. Although Lord Stair has not treated of this subject with his usual accuracy, yet the Deponent does not consider his Lordship's opinion as decidedly contrary to what he the Deponent has above ventured to state, for although Lord Stair, b. i. t. 4, seems to think that the public solemnization of marriage though enjoined by the law is not essential, and takes notice of the distinction betwixt public and private, or clandestine marriages; yet, when he comes to specify how a private or clandestine marriage is constituted, he refers to cohabitation, and being commonly reputed man and wife, which he observes, validates the marriage, and gives the wife right to her terce, by the Statute 1503, ch. 77, and he also refers to a contract of marriage found valid, though the marriage was never solemnized, and to a similar case in which the contract of marriage was found valid, and the man obliged to solemnize the marriage, seeing he had procreated children with the woman, and by his writings had acknowledged he had married her; all this seems to the Deponent to confirm the opinion that *rebus integris*, a contract or declaration of marriage may be resiled from; his Lordship has indeed said, upon the authority of the canon law, that *consensus non coitus facit matrimonium;* this is certainly true, it is not the *coitus* that makes the marriage, but the consent must be expressed in the regular way the law requires, by solemnization, and if is not so expressed, the court must judge whether by facts and circumstances, the alleged consent has been carried into effect, and will not give it greater weight than the declaration of parties *de*

præsenti

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præsenti in a regular contract of marriage, that they accept of each other as husband and wife, and that they will afterwards cohabit as married persons, or celebrate the marriage with their first conveniency. As to the writings No. 2, and 10, they are stated in the envelope to be sacred promises and engagements, which demonstrates the opinion of the parties that further celebration was to take place; and in the writing No. 10, Mr. Dalrymple says, "and as such I shall acknowledge her the moment "it is in my power," and Miss Gordon declares "that nothing but "necessity shall ever force me to declare this marriage," which seems also to imply that something farther was to be done. And therefore, even according to this view, the Deponent conceives either party may have the power of resiling while matters are entire. But if parties have acted upon the faith of it by consummation or cohabitation, this, as in every other agreement, must bar *penitentia*, and must of course render the consent of equal effect as if given *in facie ecclesiæ*, Mr. Erskine's doctrine is more unfavourable to the opinion the Deponent has formed. He has referred to no authority where the private consent of parties by words *de præsenti* has been found sufficient to constitute marriage by the mere emission of words or by a writing, either consummation or cohabitation having followed upon it. The Deponent has already said, that he can find no such case; and the three cases which have been decided since Mr. Erskine's Institute was written, viz. M'Lauchlane, M'Innes, and Taylor, in all of which the most express words *de præsenti* are made use of, seem to the Deponent to be sufficiently strong to shake the opinion of Mr. Erskine unsupported by any authority whatever. Besides, about the very time that Mr. Erskine wrote his book, a most learned and able judge had formed a decidedly contrary opinion, which has been published in his Elucidations respecting the law of Scotland, and which appears to the Deponent entitled to very great weight, vide Kaime's Elucidations, article 5. The Deponent apprehends that the consent or acknowledgement *de præsenti* may be proved by witnesses, or it may be proved by writing, and it will be equally effectual whether it be proved in the one way or the other. If proved by writing, it should be by a holograph writing, or by a writing attested before two unexceptionable witnesses. The Writing No. 10 is neither the better nor worse of "Charlotte Gordon, witness;" a woman cannot be an instrumentary witness; and on account of her being the sister of one of the parties, she could not be examined on her part; vide 10th July, 1790, Dalziel against Richardson.

8. To

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8. To the eighth article of the said Allegation, the Deponent is humbly of opinion and says, that by the general law, usages, and customs of Scotland, the Writings there mentioned and alluded to do not amount to more than an obligation to solemnize a marriage in the face of the church at some future period, provided either party should be duly called upon so to do, and there should be no legal impediment to the said marriage; and if the woman shall afterwards be aware, or have just grounds to presume that it is not the intention of the man to proceed to the solemnization of the marriage in pursuance thereof, and in particular shall have knowledge or credible information that he is about to solemnize marriage with another person, and thereupon shall omit or neglect to call upon him to proceed to the solemnization and completion of that marriage in pursuance of such obligation, and to institute legal proceedings for giving effect thereto, and the man shall accordingly without objection or interruption in due and legal form solemnize marriage with another person, then such obligation to marry as is contained in the said papers or any of them, cannot operate to render void the subsequent marriage so duly and lawfully solemnized. If a legal marriage has taken place, then any posterior marriage of one of the parties must be null. No doubt in the case of Pennycook against Grinton, 15th December 1752, it was found that a promise of marriage followed with a copula makes a lawful marriage, and that an after-marriage of one of the parties was void. Lord Kaimes has most justly questioned the authority of this judgment, and seems to think it must have had great weight, with the court, that proclamation of banns had not taken place in the posterior marriage. His Lordship certainly assigns the strongest reasons for questioning it, and the Deponent doubts much how far the court would now pronounce a similar judgment, especially when he considers two other cases which he thinks materially affect this question; the one is the case of Magdalen Cochrane against Campbell, 19th June 1751, and affirmed in the House of Lords, 31st January 1753; and the other that of William Napier against Napiers, 12th June 1801. In both of these cases there was the strongest evidence of anterior marriages produced, such as the Deponent is quite satisfied must have established these marriages, had not other marriages taken place in which the rights of third parties were involved. The Court of Session, in the first case, found that the Pursuer by her acquiescence for many years was barred *personali exceptione* from being admitted to prove that she was married to Mr. Campbell of Carrick, before he was married to Jean Campbell.

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Campbell. This interlocutor was appealed, and the judgment was of consent reversed 6th February 1748, and both parties led their proof; Magdalen Cochrane accordingly alleged that Mr. Cockburn, the episcopal clergyman who married them, together with the witnesses who were present, were dead; that Mr. Cockburn being afraid of the penalties of celebrating a clandestine marriage, had refused to grant a certificate, but declared that the certificate granted by Mr. Campbell was equally effectual as if granted by him; and Mr. Campbell accordingly granted the strongest certificate, declaring that he was that day married, and that she was his wife: she produced that certificate, and she proved their previous courtship and a general report in the town of Paisly and neighbourhood of the marriage, at the time it was celebrated, and recent declarations to third parties by Mr. Campbell; that they had been married by Mr. Cockburn, and before his two servants, the persons mentioned by the Pursuer; and there was evidence of the consummation, and of their having cohabited as man and wife, and there were no less than 128 letters all written by Mr. Campbell to her as his wife; in short, there was a proof of marriage by declaration *de præsenti*, and facts and circumstances which in an ordinary case would have been irresistible; but as she had been prevailed upon to keep the marriage secret on account of Mr. Campbell's situation, and after his second marriage, at his earnest solicitation to save him from absolute ruin, the Deponent conceives that when the Commissioners found Magdalen Cochrane's marriage not proved, and Jean Campbell's marriage established, they must have decided the case upon the second marriage, as a mid-impediment which prevented the evidence as to the first marriage, which did not amount to a celebration *in facie ecclesiæ*, receiving full effect. The case of Napier versus Napiers was of a similar description, the evidence of the first marriage by cohabitation, habit, and repute, the Deponent thinks, must have prevailed, had not a second marriage taken place *in facie ecclesiæ*. Lord Kilkerran, p. 488, in reporting the opinion of the court in the case of Linen versus Hamilton, shows also that the court at that time first assembled, 1749, understood that in the case of a promise of marriage *cum copulâ subsequente*, a man by entering into another marriage in the meantime, might prevent the woman from pursuing for a declaration of marriage, as he states the opinion of the court to have been, that if the man in the meantime married another woman, there could be no process for adherence, and he refers to the case of Kerr versus Hislop in 1796 as ascertaining this.

9. To

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9. To the ninth article of the said allegation the Deponent deposes and says, that if a writing be holograph by the law of Scotland, it does not require the attestation of two competent witnesses; the Deponent has already stated that Charlotte Gordon cannot be an instrumentary witness.

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Examined upon Interrogatories.

1. To the first of these Interrogatories this Respondent deposes and answers affirmative.

2. To the second Interrogatory the Respondent deposes and answers, that he thinks a marriage may be constituted in Scotland by promise and subsequent copula, or by a solemn verbal or written declaration of parties, if followed by consummation or cohabitation as man and wife, without reference to the legal domicile or place of the parties residence.

3. To the third Interrogatory the Respondent deposes and answers, that he thinks marriages celebrated at Gretna Green or other places in Scotland, will be effectual marriages although both parties were domiciled in England, provided the celebration, or what has followed upon it, be sufficient to constitute a marriage by the Law of Scotland; and the Respondent considers that this doctrine is confirmed by the decision of the court Wyche versus Blount, 27th June 1801.

4. To the fourth Interrogatory the Respondent deposes and answers, that he is not acquainted with any decision, maxim, or authority declaring that persons not domiciled in Scotland are not subject to the law of marriage there.

5. To the fifth Interrogatory the Respondent deposes and answers affirmative, except as to the last part, as he does not think any consent *de præsenti* except *in facie ecclesiæ, rebus integris*, can constitute a marriage in these circumstances, upon the grounds he has endeavoured to explain in his deposition in chief.

6. To the sixth Interrogatory the Respondent deposes and answers, that he apprehends that parties are entitled to resile from every obligation to marriage, provided that matters are entire; but if they have cohabited together subsequent to that obligation, he thinks they cannot resile.

7. To the seventh Interrogatory the Respondent deposes and answers, that Lord Stair's Institutes is a book of great authority in the law of Scotland. The passage alluded to in this Interrogatory must be considered with the context, and the Deponent doubts

doubts very much how far the doctrine which seems to arise from these words taken by themselves, can be recognized as the existing law of Scotland.

8. To the eighth Interrogatory the Respondent deposes and answers, that Erskine's Institutes is one of the latest institutional works of authority in the law of Scotland, but the Respondent does not think that the doctrine laid down in the passage quoted, has been recognized as the existing law of Scotland: In the last edition this doctrine is attempted to be corrected by a note of the editor referring to different causes decided since Mr. Erskine's book was written.

9. To the ninth Interrogatory the Respondent deposes and answers, that he thinks the case of Kello and Taylor would have been a decision in favour of this doctrine, had it not been reversed. In the case of Inglis and Robertson, *concubitus* is not denied in the defences. The case of Callender versus Boyd the Respondent is not acquainted with. And in the case of Cochrane against Edmonstone it was admitted that he had slept with her the very night after the writing had been granted.

10. To the tenth Interrogatory the Respondent deposes and answers, that he thinks that the case of M'Lauchlane versus Dobson, and the case of More versus M'Innes, had an opposite import to the doctrine here stated; and in the case of Taylor versus Kello, although a specialty has been introduced into the judgment of the House of Lords reversing the decision of the courts below, yet the Respondent thinks this judgment completely shakes this case as an authority in support of the doctrine stated in this Interrogatory, and leaves room for founding on it as importing a contrary doctrine.

11. To the eleventh Interrogatory the Respondent deposes and answers, that he does not think that a solemn written or verbal declaration of such consent, and not made *in facie ecclesiæ*, constitutes marriage by the law of Scotland, without either cohabitation or a subsequent copula.

12. To the twelfth Interrogatory the Respondent deposes and answers, that he has already taken notice of some distinctions betwixt M'Adam's case and the present: That case however certainly supports the doctrine in the Interrogatory, but he does not think that case well decided; and until it be decided in the House of Lords, where an appeal has been entered, he cannot consider it as laying down the law of Scotland.

13. To the thirteenth Interrogatory the Respondent deposes and answers, that it has been decided (in the case of Johnston

versus

versus Smith, 18th November 1766), that in a declarator of marriage, where the writings were neither holograph nor subscribed before witnesses, they were not sufficient evidence, but in that case the party was dead.

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14. To the fourteenth Interrogatory the Respondent deposes and answers, that he thinks where the party has judicially admitted that he did knowingly and deliberately write, and sign, and deliver the writings in question, the want of the solemnities to the writings is not of much consequence.

15. To the fifteenth Interrogatory the Respondent deposes and answers, that in the last case which he is acquainted with, the Court of Session found that the mother and sister of the pursuer in a declarator of marriage were not admissible witnesses.

16, 17. To the sixteenth and seventeenth Interrogatories the Respondent answers, that he is unacquainted with any cases in which this point has been argued, except in the cases of Pennycook against Grinton, Cochrane versus Campbell, and Napier versus Napiers, already taken notice of in his deposition in chief. In the first of these cases, the court found the second marriage null in respect that the first was proved. In the two last cases, although the evidence of the first marriage was fully as strong, the court gave effect to the second marriage, but without determining this point of law. Lord Kaimes (in his Elucidations, article 5th), has given a decided opinion, that a second marriage *in facie ecclesiæ* would in such a case be effectual. And to the additional Interrogatories the Respondent deposes and answereth, that soon after these proceedings commenced, as he believes, he received a retaining fee, and also a case with correspondence upon the part of Mrs. Laura Manners, and he understood himself to be retained as her counsel, in the event of any proceedings on her part in Scotland, but he has given no advice upon the subject matter of the said action, or any way relative to the defence to be maintained against the claim and suit of the Plaintiff, nor has he ever attended any consultation in the cause.

DAVID CATHCART.

20th November 1809.

ADAM GILLIES, Esq. of the city of Edinburgh, Advocate, aged forty-three years, a Witness produced and sworn, deposes,

THAT he has practised as an Advocate before the Court of Session in Scotland, since the year 1787.

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7, 8, 9. And

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7, 8, 9. And to the seventh, eighth, and ninth articles of the said Allegation, the Deponent having attentively and deliberately perused and considered the several articles of the said Allegation, with the Exhibits annexed thereto, and also the Libel given in the said cause on the part of Johanna Dalrymple the promoter, and the original Exhibits, marked Nos. 1, 2, 10 and 11, and the several original Letters annexed to the said Libel, he deposes and says, that he is of opinion that the laws and usages of Scotland, affirming the validity of marriage not proved to have been solemnized in the face of the church, do apply to a person resident in that country at the time when he is said to have contracted such marriage, although such person should only be quartered there as a soldier in the manner set forth in the Allegation, and although he should have his proper domicile not in Scotland but in England, or in any other foreign country. In some cases however it may be a circumstance of considerable importance, that the party against whom a declarator of marriage is brought in Scotland, has merely been casually resident instead of being regularly domiciled in that country. Thus where the pursuer of a declarator of marriage alleges cohabitation and habit and repute as man and wife, and founds on these circumstances as establishing a marriage with the defender, the deponent thinks that it would be requisite that these Allegations should be proved by stronger and more pregnant evidence, in the case of a person whose residence in Scotland was casual and temporary, than in the case of one who is properly domiciled in that country. In both cases, the circumstances, by which cohabitation and habit and repute as man and wife are attempted to be establised, must be of an uniform tenor, so as to indicate the understanding of the parties that they are married to each other, which in every such case is necessary to constitute a marriage; but such understanding may fairly be inferred from fewer and slighter circumstances in the case of persons domiciled in Scotland than in the case of persons only casually resident in that country. The Deponent is further of opinion that the alleged promise, acknowledgment, or declaration of marriage as contained in the Paper-Writings, marked No. 1, No. 2, No. 10, and No. 11, derives no additional force from the circumstances of the parties having had carnal copulation together at any time previous to the dates of such writings, and if they had no carnal copulation together, and did not cohabit together as man and wife, and were not commonly reputed as such subsequent to the date of the said writings or any of them, the Deponent then thinks that the said promise, acknowledgment, or declaration,

claration, upon the supposition that the writings in which it is contained afford legal evidence of the same, is not sufficient to constitute a valid and effectual marriage. The Deponent is further of opinion, that the promise, acknowledgment, or declaration contained in the writings already referred to, did not amount to more, upon the part of Mr. Dalrymple, than an obligation to solemnize a marriage in the face of the church at some future period, and this obligation is rendered ineffectual by his subsequent marriage duly and legally solemnized in England. The writings No. 2, and No. 10, above referred to, if they are, as they are alleged to be, of the handwriting of Mr. Dalrymple the Defendant, do not require to be tested or subscribed by witnesses in order to be probative, or to entitle them to bear faith in judgment: did such writings require to be tested, the attestation or signature of Charlotte Gordon could be of no avail; 1st, Because a female is incapable of being an instrumentary witness; and 2dly, Because it is requisite that there should be two witnesses to all deeds which are not sufficiently authenticated by the subscription of the party.

ADAM GILLIES.

Examined on Interrogatories.

1. To the first of these Interrogatories the Respondent deposes and answers, that he is of opinion that a marriage celebrated in Scotland *in facie ecclesiæ* between parties under twenty-one years of age, and without the consent of parents or of guardians, would be valid and effectual by the law of Scotland, although neither of the parties had any fixed domicile in that country.

2. To the second Interrogatory this Respondent deposes and answers, that as it consists of different parts, or rather as it involves several Interrogatories, he considers it necessary for the sake of distinctness to make a separate answer to each. 1st. It is asked whether marriage may not be constituted between parties in Scotland by promise and subsequent copula, with equal effect in point of validity as it may be by a celebration *facie ecclesiæ.*—Answer. In the Respondent's opinion, a marriage between parties in Scotland cannot be constituted with equal effect in point of validity by promise and subsequent copula, as by celebration *in facie ecclesiæ:* he considers this however as a point of much difficulty, and states his opinion upon it with much diffidence. He certainly thinks that by a promise and a subsequent co-

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pula, a party incurs an obligation to solemnize a marriage in face of the church, from which he is not at liberty to resile, and which, if no impediment intervened, would be enforced against him, and his marriage declared by the courts of law in Scotland; but if prior to the institution of any such action of declarator of marriage, the party against whom it is brought had publicly married another woman, by a marriage duly proclaimed and regularly celebrated without objection *in facie ecclesiæ*, the Respondent should consider this as a legal impediment sufficient to prevent a decree of declarator of marriage from being pronounced in the action founded on the prior promise and copula, and he should think that the courts of law in Scotland would hold that the second marriage celebrated in *facie ecclesiæ* was valid, and consequently that the party Defendant was not bound to fulfil, or rather could not fulfil, the obligation previously incurred by him by the promise and copula. The decision in the case of Pennycook against Grinton, 15th December 1752, appears to be hostile to the opinion which the Respondent has now expressed; but in that case the marriage of Grinton with Ann Graite was not duly and regularly proclaimed and celebrated; and it appears to the Respondent that Lord Kaimes's remarks upon the decision in the case of Grinton, in his Elucidations respecting the Law of Scotland, article the fifth, are sound and just. Secondly, It is asked whether marriage may not be constituted between parties in Scotland by solemn verbal or written declarations of consent *de præsenti*, or of mutual acceptance of each other as husband and wife, with equal effect in point of validity, as it may be by celebration *in facie ecclesiæ*.—Answer. The Respondent conceives from the way in which this Interrogatory is put, it is not easy to return a definitive answer to it. To make a marriage valid by the law of Scotland it is not necessary that it should be regularly celebrated in *facie ecclesiæ*, neither is it requisite that it should be celebrated by a clergyman or by a person actually in holy orders; but on the other hand the Respondent is of opinion that a simple consent to marry expressed *de præsenti*, whether in writing or verbally before witnesses, is not, *rebus integris*, sufficient to constitute a valid marriage; and he conceives the law upon this point to be correctly stated in the following observation, which is said to have been made from the Bench in the report of the case of M'Lauchlane against Dobson, 6th December 1796. "Although by the law "of Scotland there are no precise forms which are indispensable "in the solemnization of marriage, yet *rebus integris* it can only "be constituted by a consent adhibited in the presence of a "clergyman,

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" clergyman, or in some other solemn mode equivalent to actual " celebration." Lastly, it is asked whether in all cases marriage be not held to be constituted by the consent of the parties as expressed at the time, and without reference to their legal domicile or place of residence?—Answer. The Respondent conceives that all parties resident in Scotland are, in regard to marriage, subject to the laws of Scotland, and he therefore thinks that if the consent of the parties as expressed at the time, is such as would be sufficient to constitute a valid marriage betwixt them, supposing them to be domiciled in Scotland, the same would be sufficient to make a valid marriage although they were both or either of them not domiciled in that country; at the same time it appears to the Respondent to be a circumstance of importance that both of the parties, or even that one of them is a foreigner, having no domicile in this country, as such circumstance may have material influence upon the opinion that may be formed as to the intention or understanding of such party in declaring his or her consent to the marriage. In every case where marriage is not duly celebrated in *facie ecclesiæ*, it is an essential requisite that the intention of the parties to contract a valid marriage should be fully proved, and in judging of such a proof it may be a circumstance of considerable weight that one of the parties was a stranger and had no domicile in Scotland.

3. To the third Interrogatory the Respondent deposes and answers, that he is of opinion that marriages celebrated at Gretna Green, or other places in Scotland near the borders, between persons domiciled in England and recently arrived from that country, are effectual marriages by the law of Scotland, provided the celebration be such as would have made a valid marriage between parties domiciled in that country; and the Respondent thinks this was substantially found by the decree of the Court of Session in the case of Wyche against Blount, 27th of June 1801, of which he understands that the circumstances were such as they are stated to have been in this Interrogatory.

4. To the fourth Interrogatory the Respondent deposes and answers, that he has already stated it as his opinion that parties in Scotland, whether domiciled in that country or not, are subject to the Scotch law of marriage, and he is not acquainted with any decision, maxim, or dictum of authority in the law of Scotland of a contrary tendency, neither does he know of any decision, maxim, or dictum of the law of Scotland declaring that parties in that country, but not legally domiciled there, will not be effectually married by deliberately performing those acts which consti-

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tute marriage between domiciled residents in Scotland; but he is of opinion, as he formerly stated, that the circumstances of both or either of the parties having no domicile in Scotland, may be of importance in judging of their actual intention and meaning at the time when they performed those acts, from which their marriage is inferred, or by which it is attempted to be proved.

5. To the fifth Interrogatory the Respondent deposes and answers, that he is of opinion that a marriage celebrated in the face of the Scottish church, between a Scottish woman and an English officer quartered with his regiment in Scotland, will be valid and effectual by the law of Scotland, although such celebration may have been unattended with those observances necessary to make a marriage effectual in England. He farther thinks, under the qualification which he has already endeavoured to explain as to the effect which the circumstance of his being a foreigner might have, in the scale of evidence with regard to his intention, that in the case of an English officer quartered with his regiment in Scotland, the same effect would be given to a promise *subsequente copulâ*, as to a solemn written declaration *de præsenti*, as in the case of a domiciled Scotchman.

6. To the sixth Interrogatory the Respondent deposes and answers, that he thinks there is such a thing recognized in the law of Scotland as an *obligation to marry*, which the parties can be absolutely bound to fulfil, and that they may not in all cases resile from a mere obligation, being liable only to a claim of damages for breach of engagement.

7. To the seventh Interrogatory this Respondent deposes and answers, that Lord Stair's Institute is a work of great authority in the law of Scotland, but he does not think that his doctrine, as expressed in the short passage of that work which is quoted in this Interrogatory, is recognized as the existing law of Scotland. Neither does he think that Lord Stair's own opinion on the subject can be fully or accurately collected from the words of this passage when taken by itself. It is explained, and in a great measure qualified by the context, though in the whole of this section of his work it appears to the Respondent that Lord Stair has not expressed himself with his usual perspicuity. With a reference to the manner in which he and other writers on the law of Scotland have treated the subject of marriage, Lord Kaimes, in his Elucidations, (page 29), expresses himself as follows: "Few "branches of our law are handled with less precision than what "particulars are necessary to complete a marriage. There is a

"darkness

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" darkness and confusion in our writers from jumbling together " three points that are clearly distinct. The first is what solem- " nities are necessary to complete a marriage? The second, what " circumstances are sufficient to presume that marriage has been " regularly solemnized? And the third, what circumstances are " sufficient to oblige a party by a process to solemnize a marriage?" The Respondent entirely concurs in the justness of these observations.

8. To the eighth Interrogatory the Respondent deposes and answers, that Mr. Erskine's Institutes is one of the latest institutional works of authority on the law of Scotland, but he does not think that his doctrine, as expressed in that passage of his Institute which is here quoted, is recognized as the existing law of Scotland; and accordingly, by the last editor of Mr. Erskine's work, there is a note upon this passage, in which he states that from the later decisions of the court, (page 95,) " there is reason to doubt if " it can now be held as law, that the private declarations of parties, " even in writing, are *per se* equivalent to actual celebration of " marriage."

9. To the ninth Interrogatory the Respondent deposes and answers, that the doctrine said to be laid down by Lord Stair, and Mr. Erskine, in these passages of their works which are recited in the two last Interrogatories, does not appear to him to be recognized and confirmed by any of the decisions here alluded to. Had the judgment of the Court of Session, in the case of Taylor against Kello, remained unaltered, it would certainly have been a decision tending to confirm the doctrine said to be laid down by Mr. Erskine; but the decision of the Court of Session in that case was reversed by the House of Lords; and although the judgment of their Lordships bears to have proceeded upon special grounds, yet, on attending to the circumstances of the case, the Respondent considers the reversal of the Court of Session's decree as a decision hostile to the doctrine mentioned in this Interrogatory. From the report of the case of Inglis against Robertson it appears that the Defendant did not deny *concubitus*, which must have been subsequent as well as prior to the written declarations founded on. The case of Callander versus Boyd, is one with which the Respondent is not acquainted, and which is not reported so far as he can find; the case of Edmonstone versus Cochrane is in like manner not reported, but in that case also he understands that the declaration was followed by a copula.

10. To the tenth Interrogatory the Respondent deposes and answers, that judgments of an opposite import appear to him to

have

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have been pronounced in the Court of Session and by the House of Lords in the following cases, viz. M'Innes versus More, December 20th, 1781; Anderson versus Fullerton, Nov. 13th, 1795; and M'Lauchlane versus Dobson, 16th Dec. 1796. In the first of the cases above mentioned there was a written acknowledgment or declaration of marriage *de præsenti*; and in the last case, that of Dobson, there was a verbal declaration *de præsenti*, in presence of witnesses, and that preceded by a long correspondence wherein the parties styled each other husband and wife, which the Respondent conceives to be fully equivalent to a written declaration of consent *de præsenti*. In answer to the remaining part of this Interrogatory, which regards the reversal of the judgment in Taylor versus Kello, the Respondent has stated already all that occurs to him.

11. To the eleventh Interrogatory this Respondent deposes and answers, that he does not distinctly comprehend what is meant by the term solemn, as it seems applied in this Interrogatory, and in some preceding ones, to a consent *de præsenti*, or declaration of marriage, when such consent or declaration has not been exhibited or, made in presence of a clergyman, or accompanied with any ceremony such as can be deemed equivalent to actual celebration. The Respondent is however of opinion that a consent *de præsenti* expressed verbally before witnesses, and without particular ceremony or solemnity, is not sufficient *per se* to constitute a valid marriage. And he also thinks that declarations or acknowledgments of marriage in writing interchanged betwixt the parties privately, and without the intervention of witnesses, are not sufficient, *rebus integris*, to constitute a valid marriage.

12. To the twelfth Interrogatory this Respondent deposes and answers, that in the case of M'Adam versus M'Adam, a verbal declaration of consent *de præsenti*, made in the presence of witnesses called or assembled together for the purpose, was sustained as a sufficient ground for a declarator of marriage. But in that case no attempt was made by either of the parties to resile, as indeed the declaration was followed a few hours after by the death of one of them.; with respect to this case, however, it is to be observed, that the judgment pronounced in it by the Court of Session is not final, but is now under appeal to the House of Lords, in which it may possibly be reversed; and the Respondent does not therefore consider that judgment as fixing any point of law. With the exception of the case of M'Adam, the Respondent does not know of any in which a simple consent *de præsenti* expressed verbally before witnesses was held sufficient, *rebus integris*, to constitute

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stitute a valid marriage; and he is of opinion that in the various writings annexed to the Libel in the present case, there are not contained such full and explicit declarations *de præsenti* as have been found sufficient to make a valid marriage in any case with which he is acquainted.

13. To the thirteenth Interrogatory the Respondent deposes and answers, that if it were law that a written declaration of marriage was sufficient *per se* to constitute a marriage, he thinks it would follow that such declarations would be held to be among the writings to which the solemnities of formal deeds are required by the law of Scotland. Upon the supposition which has been made, such writings would be truly deeds of importance, to the validity of which, unless holograph of the party, such solemnities are essential. In answer to the remaining part of this Interrogatory the Respondent can only say, that in none of the cases already referred to does it appear to him that a written declaration of marriage *per se* was found to constitute a valid marriage.

14. To the fourteenth Interrogatory the Respondent deposes and answers, that in a question of marriage, or in any question of personal obligation, he thinks the want of the solemnities above mentioned will be sufficiently supplied by the judicial admission of the party that he did knowingly and deliberately write or sign and deliver the writings in question.

15. To the fifteenth Interrogatory the Respondent deposes and answers, he thinks that a sister or other near relation, such as an uncle or an aunt, cannot be examined as a witness even in an occult family transaction, such as a clandestine marriage, where there is a *penuria testium*. Nor is the objection to the admissibility of a sister removed by the circumstance of her being a subscribing witness to the writing which she is to authenticate.

16. To the sixteenth Interrogatory the Respondent deposes and answers, that there is no decision nor any other authority in the law of Scotland for holding that a party already actually married can validly enter into a second marriage, but he conceives that a party may make promises and declarations, and perform acts by which he incurs a valid obligation to solemnize a marriage; and that such obligation will be enforced against him if an action for that purpose is brought before he enters into a second marriage, and will not be enforced against him if the action is delayed until a second marriage is contracted: And this opinion seems to be confirmed by the judgment of the Court of Session in the

the case of Cochrane against Campbell, which judgment was affirmed by the House of Lords on the 31st of January 1753.

17. To the seventeenth Interrogatory the Respondent deposes and answers, that with regard to the decision in the case of Pennycook versus Grinton, he has already stated all that has occurred to him. He considers the judgments in the Court of Session, and of the House of Lords, in the case of Campbell to which he has just alluded, to be of an opposite tendency to the decision of the Court of Session in the case of Grinton, as the proof of the prior marriage in that case appears to the Respondent to have been stronger than in the case of Grinton.

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Additional Interrogatories.

1. To the first of these additional Interrogatories the Respondent deposes and answers, that he is of counsel for Mr. Dalrymple, the Defendant in this Cause, and has since its first commencement been occasionally employed by him in conducting his defence.

2. To the second additional Interrogatory the Respondent deposes and answers, that he did give his advice and assistance in preparing and framing the cross Interrogatories here mentioned, but this part of the business was conducted chiefly according to the directions of Mr. Clerk, a preceding witness examined in this cause, and the Respondent does not think that he himself prepared any of the cross Interrogatories, though some additions or alterations may have been suggested by him and adopted.

3. To the third additional Interrogatory the Respondent deposes and answers, that according to the best of his recollection he did not give any advice and assistance in preparing, altering, or revising the Allegation or pretended Allegation mentioned in this Interrogatory.

4. To the fourth additional Interrogatory the Respondent deposes and answers, that as counsel for the Defendant he did suggest or advise the plea here mentioned as now maintained by him, and at the time of giving that advice he believes he was informed by his employer, and consequently he would take it for granted, that the Plaintiff was in the thorough knowledge not only that

that the Defendant had returned to Britain, but also of his courtship of, and intended marriage with Miss Manners.

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5. To the fifth additional Interrogatory the Respondent deposes and answers, that the supposition which is here put would have had little or no influence with him in forming his opinion upon the point mentioned in this Interrogatory.

ADAM GILLIES.

22d October 1810.

SIR ILAY CAMPBELL, BART.

SIR ILAY CAMPBELL, Baronet, late Lord President of the Court of Session in Scotland, aged seventy-six years, a Witness, produced and sworn, deposes, that prior to the month of November 1808, he was for nineteen years President of the said Court; and to the seventh, eighth and ninth articles of the said Allegation, this Deponent having attentively and deliberately considered the several articles of the said Allegation with the Exhibits annexed, and also the Libel given in this cause on the part of Johanna Dalrymple, the promoter, and the original Exhibits, marked No. 1, 2, 10, 11, and the several original letters annexed to the said Libel, he deposes and says, that the general principle of the law of Scotland with respect to marriage is, that it is perfected by the mutual consent of parties accepting each other as husband and wife. The solemnities of a regular marriage, although required as matter of order and as the most unexceptionable form of entering into that state, are not held to be indispensable, and accordingly irregular marriages, *i. e.* without the usual forms, are very common in Scotland: as the consent however which is necessary to constitute the matrimonial contract, must be deliberate and serious, clearly denoting the intention of the parties to become husband and wife, and attended with no ambiguity, questions often arise concerning the validity of irregular marriages, and the decision of these must of course depend in a great measure on the circumstances of each particular case. An irregular marriage may be constituted, or rather it may be said, proved in various ways.

1st. By cohabitation as husband and wife at bed and board, and general habit and repute. This has even been sanctioned by statute (1503, c. 77), and forms a presumption so strong scarcely to be called in question.

2d. By promise *de futuro* and copula following upon it, because the engagement, though having a reference to future time, is

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is supposed to be purified by the act of consummation, and rendered a present contract, if there be no middle impediment to bar the claim.

3d. By formal acknowledgments *per verba de præsenti*, either in writing, or declared before witnesses, though not in presence of a clergyman; but these must appear to have been made with the deliberate intention of living together as husband and wife, and must be attended with personal intercourse, if not subsequent, at least prior, otherwise they will resolve into a mere *stipulatio sponsalitia*, similar to what is in every contract of marriage in the Scots form, which proceeds on a recital that the parties have accepted of each other as husband and wife, but which may be resiled from, *rebus integris*. The Court of Session was of this opinion in the case of M'Lauchlane against Dobson, 6th Dec. 1796, which the Deponent apprehends was rightly decided. Had there been either an antecedent or a subsequent copula by which matters were not entire, it is probable that the court would have decided otherwise; though this is not clear, as there were circumstances tending to shew that the parties did not truly mean to live together, and both of them admitted that there never was cohabitation of any kind between them. In the case of a regular marriage *in facie ecclesiæ*, celebrated by a clergyman, it may happen that the parties may accidentally be prevented from going together, *e. gr.* the man or the woman may die suddenly before any bedding. Yet the Deponent conceives that the status of marriage would be complete, agreeably to the maxim *consensus non concubitus facit matrimonium*, but every thing short of the actual and regular ceremony ought to be considered in a different light. These doctrines of the law of Scotland are treated more fully in our law books. The latest author, who of course takes notice of all the modern decisions upon the subject, is Mr. Hutchinson. See his book on Justice of Peace Jurisdiction, second edition, Book iii. chap. 8. The cases of M'Innes against More, and Taylor against Kello, with the judgments upon them in the House of Lords; likewise the case of M'Culloch, 10th Feb. 1759, with the reversal in the House of Lords, may be particularly attended to, as it seems to have been thought in these cases that the Court below had gone rather too far in sustaining equivocal evidence of marriage. In the present case (Dalrymple against Dalrymple) habit and repute, or any known cohabitation as husband and wife, are out of the question, so far as appears to the Deponent from any of the materials laid before him, and therefore the first of the above grounds for declaring marriage does

not

not apply. The second is in part made out by written evidence, for the writing No. 1, which, if acknowledged or proved to be holograph, contains a clear promise of marriage, or rather mutual promises; but the subsequent consummation is disputed, which therefore must depend upon proof, and if proved it will then be for the judge to consider whether this ground for declaring a marriage is or is not effectually opposed by other circumstances requiring to be attended to, such as those to be afterwards mentioned. The third is also so far proved *scripto*, by the Writing, No. 2, which contains a very explicit mutual declaration of marriage *de præsenti*, and by various letters under the hand of the party, John William Henry Dalrymple, (No. 3, &c.) all of which it is alleged are holograph, and if they are either proved or admitted to be so, they of course by our law are to be held as authentic; and it is immaterial that they are not signed by witnesses, for holograph writings do not require witnesses, except to prove their dates, and nothing here seems to turn upon the precise dates, as the first ten or twelve of them appear from their contents to have been written before the party, John William Henry Dalrymple left Scotland, and the others soon after, and evidently before any middle impediment existed by marrying another. But before any conclusive inference can be drawn from these written acknowledgments of marriage however direct, it is necessary that all the circumstances attending them should be carefully examined. The Deponent does not consider it a good objection on the part of Mr. Dalrymple that he was an English officer, having no permanent domicile in Scotland, but only there transiently with his regiment. Were this a question concerning his intestate personal succession, the Deponent would consider England and not Scotland to be at present and to have been at that time the country of his domicile, the laws of which would of course be alone considered as regulating the question of succession, but the present seems to the Deponent to be a case of a different nature.

Mr. Dalrymple while in Scotland was capable of contracting debt there, and of being sued for it if found within the jurisdiction: he was also capable of contracting marriage there, especially with a Scots lady, the marriage being entered into according to any form recognized by the law of that country to be good, for which reason all the Gretna-Green marriages are held to be good, though uniformly irregular, and although by the marriage act they could not have been so made in England. But in examining

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amining the circumstances of the present case, the youth and inexperience of the party, John William Henry Dalrymple, and his being a stranger to the customs of the country, may perhaps enter into the consideration of the judge along with other circumstances, though it must also be kept in view that he was of sufficient age to marry. Another circumstance which may be thought somewhat unfavourable to the lady is, that she seems to have agreed by the Writing, No. 10, to an indefinite obligation of secrecy, and to have accepted of a similar engagement on the part of the gentleman, implying a new reference to future time, not altogether consistent with the idea of present marriage. The mutual consent in the Writing, No. 2, being of an unqualified nature, ought *not* to have been thrown loose by the suspensive and qualified obligation in No. 10. This at least is a circumstance deserving to be considered. It is said that one of the writings of No. 10. was not properly tested, and they both appear to be of the same hand-writing; but these alleged informalities seem to be of little consequence, as the writing, whether holograph of the Promoter, Johanna Dalrymple, or only signed by her, was taken into her possession, and produced by her as evidence; and it is neither the better nor the worse for being also signed by her sister. Further, the long silence of the lady as well as the gentleman after the correspondence ceased, by which both the one and the other might be put off their guard and third parties might be deceived, are circumstances which in such a case cannot be laid out of view. It is not said there was any child in the case, or any personal intercourse subsequent to the gentleman's leaving Scotland in summer 1804: the whole written evidence of their prior connection seems to have been in the hands of one of the parties, and consequently in her power, and no step was taken to interpel marriage with another. These are circumstances which call for explanation. The case of Magdalen Cochrane against Campbell in 1747, which is to be found in Falconer's Collection, and is likewise detailed in Mr. Hutchinson's book, Vol. 4, App. iii. p. 26, seems proper to be attended to. It is also noticed in the Dictionary of Decisions, Vol. 4, *voce* Personal Objections, p. 79. These hints the Deponent merely throws out as connected with the question of law, upon which alone he presumes his evidence is required. They are submitted with the greatest deference to the very able and respectable judge who is to try the cause. He abstains from drawing any ultimate conclusion for two reasons; first, because the whole merits of the case

case are not before him; secondly, because it would be presumptuous in him to do so when he is called merely as a witness.

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ILAY CAMPBELL.

Examined on Interrogatories.

1, 2, 3, 4, 5. To the first, second, third, fourth, and fifth Interrogatories this Respondent answereth and saith, that in his deposition already given as aforesaid, he has sufficiently answered them.

6. To the sixth of these Interrogatories he deposes and says, that an obligation to marry having relation to future time may be resiled from, *rebus integris*; but the question of damages for breach of engagement remains entire.

7, 8. To the seventh and eighth Interrogatories he deposes and says, that both Lord Stair's and Mr. Erskine's Institutes are books of authority on the law of Scotland.

9, 10. To the ninth and tenth Interrogatories he deposes and says, that the decisions will speak for themselves,

11. To the eleventh Interrogatory he deposes and says, that it is already answered in his deposition in chief, as aforesaid.

12. To the twelfth Interrogatory he deposes and says, that he understands the case of M'Adam to be still in dependence before the House of Lords. He avoided saying any thing about it in his deposition as aforesaid; but since the question is asked, he is bound to answer that the judgment of the Court of Session was such as the Interrogatory describes it to have been, but that he the Respondent, and some others of the judges, disapproved of the judgment or decision, and he and they thought the case very similar to that of Fullarton, where a posthumous marriage was found to be bad.

13, 14. To the thirteenth and fourteenth Interrogatories he deposes and says, they are already answered in his deposition in chief as aforesaid.

15. To the fifteenth Interrogatory he deposes and says, that he is humbly of opinion that, as marriage ought to be public, a sister ought not to be admitted as a good witness, on the pretence of *penuria testium*.

16, 17. To the sixteenth and seventeenth Interrogatories he deposes and says, that he has already suggested that the case of Magdalen Cochrane against Campbell ought to be looked into, where there appears to have been a written acknowledgment of marriage,

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marriage, but where the Pursuer, who had allowed a marriage to take place with another lady, was ultimately unsuccesful. If the decision in the case of Grinton and Graite can be at all justified, it is upon the ground that the second marriage was also irregular. The Respondent has already said, that in judging of irregular marriages, every circumstance attending the case must be taken into view.

ILAY CAMPBELL.

Exhibits and Letters.

No. 1.

(Endorsed) "A sacreed promise."

I DO hereby promise to marry you as soon as it is in my power, and never marry another.

J. DALRYMPLE.

& I promise the same.

J. GORDON.

No. 2.

I HEREBY declare that Johanna Gordon is my lawful wife.

J. DALRYMPLE.

May 28th, 1804.

AND I hereby acknowledge John Dalrymple as my lawful husband.

J. GORDON.

No. 10.

I HEREBY declare Johanna Gordon to be my lawful wife, and as such I shall acknowledge her the moment I have it in my power.

July 11th, 1804, Edinbro. J. W. DALRYMPLE.

I HEREBY promise that nothing but the greatest necessity (necessity which situation alone can justify) shall ever force me to declare this marriage.

J. GORDON,

July 11th, 1804. (now) J. DALRYMPLE.

Witness, Charlotte Gordon.

No. 11.

"Sacreed promises and engagements."

"J. D." "J. G."

Letters annexed to and pleaded in the Libel given on behalf of Mrs. Dalrymple.

No. 3.

MY DEAREST LOVE, Dunbar, Friday Evening.

I AM waiting with impatience for the letters from Edinbro', as I expect a few lines from you; but to prevent all unnecessary disappointment I will commence mine, lest it should not arrive in time to-morrow. I am quite alone in this horrible place, and till this moment I have been most melancholy at reflecting how few hours have elapsed since *my happiness was perfect*, blest with the society of one whom I adore, and for whose happiness I would sacrifice my life; but still Hope, which seldom deserts me, remains my friend, and whispers for my consolation "You are not forgotten." Sorry am I to find that my hopes of a letter are vain; but I trust that the omission proceeds more from fatigue than illness, as I am certain one or the other must be the cause, as I know how scrupulously you observe all promises; and when you reflect on my miserable situation, cut off from all the society I liked, and banished to a wretched town without one friend to speak to, you will I am sure increase rather than diminish those dear attentions you have so repeatedly shewn me: therefore I am selfish enough to desire you to write *two letters daily*, which must be put into the post by two o'clock, and they will arrive here at eight. If you write me one every night and another in the morning it would be easier for yourself. Pray forgive my impatience in asking such a request, as you know my motive. I will be in Edinbro' by 11 *at night* on Monday, so we may arrange every thing for the Tuesday's expedition. I think it would be better not to send the curricle into town, as it is too well known, † * * * * * * * * * but as you please, you have but to order, I to obey. This most horrid place has made me so very melancholy that I fear my letter will bear some marks of it, but as I well know how anxious you are sometimes for letters, I was determined to attempt it. I shall only add that I trust all that has ever happened within our know-

† The passages, which are omitted, relate entirely to other persons, and have no bearing on the present question.

ledge may be faithfully remembered by us, and that you will never change the opinion (you have so repeatedly assured me you have of me), indeed to doubt it would be the act of the greatest ingratitude on my part. *I insist on your ordering every thing you want, and drawing on me for whatever money you stand in need of, as it is but your right, and in accepting of it you will prove your acknowledgment of it.* Let your dear picture be finished as soon as possible, as I shall be impatient for so beautiful a companion, though God knows but a poor apology for the reality. * * * * * * * * * Give my love to my dear little *sister*, and the post only allows me time to say how truly, how devotedly

I am,
Dear Wife,
Your sincere and faithful
J. D.

This Letter has the Edinburgh Post-mark of May 27, 1804.

I passed Tranent but did not see Johnson. Send me a small seal with a proper inscription, as I have only a wafer seal, which does not do: you may put it in a letter.

No. 4.

(Addressed) "Miss Gordon, Saint Andrew's Square, Edinburgh."

MY DEAREST SWEET WIFE, Tuesday.

YOU are I dare say happy at Queen's Ferry, while your poor *husband* is in this most horrible place tired to death, *thinking only on what he felt last night, for the heighth of human happiness was his.* To be near the woman we love is a sensation only to be conceived by those who have experienced what it is to be separated. God knows no one has ever felt it more severely than I have, as what hours has this cursed place lost me, hours which may never afford me the pleasure I have experienced, as fate appears determined to place us at a more remote distance. What am I to do when you are at Cluny? Heaven alone knows! It will be impossible for me to be with you; as to leaving you, the thought is distraction; think on some plan for me, as I shall be truly miserable if you do not. *Have you forgiven me for what I attempted last night?* Believe me the thought of your cutting me has

has made me very unhappy. Pray do not, you cannot, you shall not; by the power of heaven I would rather see you dead than in another's arms. The idea is misery; my sweetest love, do, do, forgive me; consider *you are my wife*, you are the only woman I ever cared for, and believe me my sentiments are not of that changeable disposition they would wish you to believe.—I am engaged, to retract is and ever shall be impossible. It was very lucky I left Edinbro' at the time I did, as I found my name down for a court-martial; but thank heaven I was in most excellent time. I think I shall soon take another voyage—I think of asking Don for leave on Saturday, and of being with you at the *usual hour*; but I shall be able more fully to arrange it on Friday. Your dear sermon is arrived; it found me at dinner with *
* * * * * * * * * * *
which will, I fear, delay this letter, but I hope most sincerely it will arrive in time for my pretty dear. Send me a long account of the expedition; was * * there? Not that I doubt my love's fidelity, but still I wish to know even her most inmost thoughts; such is the doating fondness I have and ever shall have for her, she is my only life, and as long as breath remains will I protect and preserve her. Your letter was not quite so angry as I feared it would have been, but you will pardon it *although it was my right yet I make a determination not too often to exert it. What a night shall I pass without any of those heavenly comforts I so sweetly experienced yesterday.* Thank God, a time will soon come when all those vexations will be of no consequence. Having proved my *legal right to protect you, which I have most fully established, and nothing in this earthly world ever can or shall break those ties which it will be ever my greatest happiness to reflect on.* The post allows me only to say that the dearest love is always in the thoughts of her doating *husband.*

J. D.

Mrs. Dalrymple.

Brotherly love to my *Sister* and R.

This Letter has the Edinburgh Post-mark of May 30, 1804.

No. 5.

(Addressed) "Miss Gordon, 4, Saint Andrew's Square, Edinburgh."

MY DEAREST LOVE, Wednesday.

AS I dine out with the 18th, it will probably be late before I return, in which case I shall write to you this moment.

ment. I expect by this night's post a very long letter from pretty dear, giving me a long history of all that has happened since my departure. I am just returned from taking a drive, solitary enough, at least; how much I thought of the difference between the one I took this day last week! then I was as happy as possible: when I shall take another as pleasant I know not, but most sincerely wish for it. I intend leaving this on Saturday evening, and leaving the curricle at Haddington, with directions for its following me the next day, as I intend being present at the review on the 4th, where, of course, I shall have the pleasure of meeting with you. On Saturday, therefore, we meet. The hurry I was in last night for your letter being in time, prevented my taking notice of one part of your dear little sermon, in which you seem to think my intentions are to retract from what I have said so repeatedly to you. Indeed, my love, this is not behaving right, and I insist on never finding it in your letter again, as I shall be seriously angry with you, and in turn shall lecture your want of confidence as you do my constancy; believe me, I have not spoken to a woman since I saw you, indeed, excepting * * *
* * * * * * * * * * *
I am happy to hear that Lotta does not go till Saturday, as it will give *us a better opportunity if you are at Braid.* Give her *brother's* love in the kindest manner to his pretty little *sister*; tell her I hope to see my friend become a happy man ere long, although I see many obstacles to that ever taking place. This will be a most horrible dull letter, but as your pretty epistle has not arrived, I am quite at a loss for any thing to say, as repeating what sentiments I feel and ever shall entertain for you, would not, I fear, amuse you, as you entertain so many doubts of their ever being fulfilled; forgive me saying this so often, but I am very ill-humoured at being alone so long, so the dearest of creatures will pardon me I am sure. I got your's directed to Haddington. I found B. in his bed about eight in the morning, and took the letter from him; he was asleep, and I dare say was not sensible of its loss. **** will be here by the mail of this night, this will quiet your apprehensions of me, as I am certain he would not allow me were I inclined to be foolish. I hope the seal will soon come; the ring has never quitted my finger, nor ever shall. I keep this letter open till ten, in order to answer your's. Half past nine—no letter is arrived: Great God! what is the cause? Oh! Jacky, believe me, all the torments of hell are nothing compared with what I now experience, but remember *you are mine, and may this be the last word I ever write if I ever resign you to another.*

another. I suppose ******* has made you forget the *bundle*, forget your sacred promises, but all heaven shall not tempt me to suffer you one moment in his company. I am distracted; I am truly wretched; I know not what I write. How can you use me so? *but on* [torn †] *you shall, you must become my wife*, as I will not trust you a moment out of my sight. Oh, my love! take pity on me, think on me; how doatingly fond I am of you; how I adore you! Why do you not write to me? Have I not punctually fulfilled every promise I ever made? Did I ever keep you without a letter? Did you not sacredly promise to write two letters daily for me, and have you fulfilled it? No, you have forgot me; and I am only sorry I have lived to see this day: better had it been for me if I had died, or any thing but this. I could sooner have suffered any pain, any torment; but write to me by return of post, tell me only that you love me, then I shall be happy. Oh, my love! what can be greater torment than disappointment in such a case as this? I have been mad, miserably so. I know not what I have written, as I am crying so that I can hardly see the paper. I hope you will forgive me, and pardon all I have ever offended you in, as I cannot recollect any part of my conduct which deserves so harsh a treatment; think on me, pray do, and write me your forgiveness, as I am truly unhappy if you do not. I must at all hazards come to you; better would it be for me to become an outcast of society than experience what I now do. Pray write by return of post, and say you forgive me, is all I ask, although I am ignorant how I offended you. *That God Almighty may bless and preserve my wife is the prayer of her husband.*

J. D.

No. 6.

(Addressed) "Miss Gordon, 4, Saint Andrew's Square, Edinburgh."

MY DEAREST SWEET LOVE,

Thursday.

A THOUSAND times do I thank you for your pardoning me, as till the post arrived I was most unhappy at thinking my only love and delight was seriously angry with me;

† On Sunday, on my soul.

this

this would certainly render me eternally miserable, as I could bear any thing but her anger and disdain. Your disappointment was certainly a most severe trial, one which I little deserved, as I wrote to you on Tuesday night, and even shortened what I had to say on purpose that it should be in time; how you did not receive it I am at a loss to imagine, but suppose it was owing to some mistake in the post, which you know I cannot possibly prevent, as I write every night of my life to you, and if you do not receive a letter, be certain it is not my fault. * * *
* * * * * * * * * * *
I shall pay them a visit to-morrow, as nothing but the business of this horrid day would have prevented my going, thinking that she would be there, as I wished to enquire what was the matter with you, fearing a thousand things might have happened, but as it is lucky, I did not go, your letter has afforded me real comfort as it proves how noble a soul you possess; believe me, I should conceive myself most criminal did I, after what has passed, think of being off; believe me, you need not entertain any apprehensions on that point, as I am too deeply attached to you for any thing to change; although I do lecture you, on your doubting my constancy, yet I still am pleased at it, as I consider it as a proof of your affection. * * * * * *
* * * * * * * I called on * *
he rallied me about *you*, and said that if you were at North Berwick it would not be in the power of the worst of days to detain me here; he inquired after my little *sister*, and said she was a dear little creature; *little did he think what a relationship subsisted between us.* He invited me to dine there to-morrow, but if possible I will be off, as I think it will be impossible for me to be from North Berwick in time. On Saturday night, dearest of dears, we meet: happy will it be for me, as I am quite dead without you; the time will come, I hope, when that separation shall be no more, as it grieves me even to suffer you five minutes from your *husband*, although most fully, most completely convinced of your unalterable attachment. On my part I can only say, that nothing can change my sentiments of you, they are too firmly rooted to be destroyed, independent even of those *sacred ties which unite us, my love*, for you would still be the same; *as it is now sealed*, it would be most villainous in me to alter one sentiment I ever professed. This will, I sincerely hope, convince you how sorry I am that the neglect of a letter should have made you so angry, but I desire you to inform me if you received mine of Tuesday night, that I may inquire into its loss if it did not arrive.

rive. Once more then I most solemnly request you will not allow one thought injurious to the fulfilment of all the promises and engagements I am under to you, as nothing *can* or ever should, if possible, annul them ; read this over and over, and put that confidence in me which your peace of mind, your *duty*, in short, every thing ought to be dear to you requires, as it will be the most certain way to make yourself miserable for ever, as this kind of suspicion will finally end in your being jealous if I speak to another woman. Forgive this lecture, my love, as it is the only thing I can find in you to lecture. I will let you know whatever passes to-morrow at B. ; I should not go there did I not think it would appear remarkable after the acquaintance I have with both parties. Lotta will be too much engaged to flirt with me if I was in spirits, which is far from being the case. When is the seal to be finished ? and I am all impatience in that as well as every other thing. *Put off the journey to Braid, if possible, till next week, as the town suits so much better for all parties. I must consult L. on that point to-morrow, as I well know how* apropos *plans come into her pretty head; there appears to be only one difficulty, which is where to meet, as there is but one room, but we must obviate that if possible.* I intend asking leave in August for a month, and shall bend my course North, as I wish to fix my quarters in Aberdeen for a month at least, as we could often meet there and at ****** castle. Write to me immediately on the receipt of this letter, and say you forgive me, and that you never will again disappoint me, and I shall then be really happy. Pray where is the virgin, you never mention her: what brought her to my mind heaven alone knows. That God Almighty may ever preserve my *wife*, and inspire her with the purest love for her *husband*, is the first and sole wish of her adoring

J. D.

(The full signature obliterated.)

No. 7.

(Addressed) "Miss Gordon, Braid, Edinburgh."

Tuesday, half past nine.

MY DEAREST LOVE,

CURSE on my fate, that although not wanted it should ever enter my head to come here, it is too late to attempt returning, but I will be with you *at eleven to-morrow night*. Meet

me as usual: your letter has grievously vexed me; how could you write me such a one. Believe me, in the greatest haste,

Believe me,
Your affectionate *husband*,
J. D.

P.S. Arrange every thing with L. about *the other room*.

No. 8.

(Addressed) "Miss Gordon, Braid, Edinburgh."

MY DEAREST LOVE, Thursday.

I HAVE only time to say that I have yours, but there is only half an hour to answer it. I have received several letters from town, all of which say that Lord Stair has heard the report of *our marriage*. Good God! how hard is my fate, that for the malice of a set of people I should run the hazard of being disinherited, therefore *contradict it in every company*, as my sole hope depends on him, and such a report would infallibly ruin me, which I know would hurt you, as I know you love me. I should not have mentioned this had it not been absolutely necessary for me to inform you of it; tell me if it is possible to see you now your brother has arrived, as it may be running too great risks: I shall be happy to be introduced to him. You, I hope, received my letters safe. * * * * * * * * * My father wishes me to exchange into the Foot Guards, but I shall give no decisive answer; his aversion consists in my being sent to Ireland next year; when that time arrives I will first apply for a recruiting party, then, if refused, exchange into the Guards, certain of one from them, which will detain me in Edinbro' as long as the war lasts. I hope soon to be able to see you at Braid, when I shall receive dear Lotta's pardon from her own mouth, as she knows I am very fond of her. *I have spread the report of our not being married far and near.* Would to God there was a punishment for people maliciously trying to annoy others, as we have not been exempt from our torments. * * * * * * * * * * * * * *

Believe me,
unalterably your's,
J. D.

A most extraordinary circumstance alarmed us this morning, but the post only waits, so adieu.

No. 9.

(Addressed) "Miss Gordon, St. Andrew's Square."

MY DEAREST AND ONLY LOVE,

YOUR letter has made me truly miserable; I have only read half of it, as I am all impatience to assure you how unhappy the thought of neglecting you has made me. Nothing but the most absolute necessity of drills and every other species of annoyance could have made me neglect it this day, but till five o'clock I was not at leisure a moment. Would to God I could come to town, but it is absolutely impossible this night. I will write three sheets of paper to you this night. At present this must be the only letter I have time to write. Well knowing the anxiety you must feel, and the danger of *the servant's being seen.* That God Almighty may eternally protect you is the only wish of your devoted *hus*——.

J. D.

No. 12.

(Addressed) "Miss Gordon, Braid, Edinburgh."

MY DEAREST WIFE, Halifax, July 25th.

FOR the last time I write, unless you immediately write me an explanation of the cause of your being so long silent. I cannot suppose my letters have not reached you, as I never yet found the post deceiving me; but to think that any one should have already supplanted me in your affection is too melancholy for me to support. I have been now absent ten days, during which time you have not written one word in reply to the letters I constantly sent you. If my letters are disagreeable to you why not tell me so? for it must be inferred from no notice ever being taken of them that is the case; but although you are so negligent of your promises, it shall never be said that in any one instance I departed from mine, considering them to be more strictly observed on account of the distance which separates us; but to save trouble, if I do not hear from you to-morrow, I will write to my *sister*, and desire to know what is the reason of this silence, and I am certain she will not suffer me to be kept in the perfect state of

of ignorance of what is passing with you. Believe me, that the pain that writing to you in this manner gives me is greater than I ever yet experienced, but I freely forgive you, as, indeed, I could any thing you ever did to me, only trusting that, at some future period, you may think me worthy of being restored to that place I once possessed in your esteem, and to lose which would be worse than death. I shall leave this for York to-morrow, where I remain till Sunday, possibly later; direct to me there, but you shall hear from me ere that takes place, as I shall not leave off writing till we meet. I think of visiting Aberdeen after the 24th of August, where we can meet, for I am determined to see you, cost what it will. * * *
* * * * * * *
Whatever money you want, draw on me without scruple, as I am certain you must be in want of it. Pray write to me if it is but your name: and, dearest life, believe me,

Most devotedly,
Your

D.

P. S. Send me your *picture* as soon as possible.

No. 13.

(Addressed) "Miss Gordon, 4, Saint Andrew Square, Edinburgh."

MY DEAREST LOVE, Chelsea, May 29th, 1805.

YOUR anger, on account of my negligence, is perfectly correct. I have behaved rather ill; therefore as I am fully sensible of my misdeeds, the least you can do is to extend your forgiveness. I do not wonder at your feeling hurt at it, but I hope no slight occasion will induce you to do any thing desperate, as it will prove a source of bitter regret to you afterwards. Living here I think naturally makes a man idle; but I assure you, you may depend upon my never changing any part of my conduct by separation. I have spoke on the whole affair to a very particular friend of my father's, at this time residing with him, who has assured me that he will do every thing in his power to

assist

assist both of us, but that he would advise me to wait the course of time with him, as he says he is certain he would immediately convey his fortune over in trust to somebody, were I, as things are at present, to hint at such a transaction as *marriage*; therefore I am inclined to follow his advice, particularly as situated as you are, *nothing could strengthen the ties which unite us*, and as the fortune I possess in my own right is so small and so much impaired that it would be nearly impossible for me to support you in the style of life you ought, as my wife, to be supported in; therefore it is my wish it *should not be mentioned* till such time as it can without injury to *ourselves* be done. At the same time, *I must insist on a paper properly signed by you, acknowledging yourself my wife, being sent me as soon as possible, as, in case of my death, it would be necessary for you to produce it to enable you to take possession of what I may leave behind.* I did not intend this as a melancholy epistle, but as essentially necessary to both our interests, therefore look upon it as such, and as you obey me, or I you, we shall be as happy as otherwise we should be miserable. * * * * *
* * * * * * *
Write to me as soon as you can, and never, my love, be annoyed at not hearing from me, as you may depend upon my ever holding your interest in my mind, and as there is nothing I would not sacrifice for your good, so am I certain there is nothing you would consider too much to be done for me, well knowing your genuine goodness of heart and disposition. I met Captain J. again, which is very disagreeable, as considering his relationship it makes it very unpleasant, and I wish particularly to be reconciled with both of them were it possible, but as you know the temper of the one, I am very apprehensive it is not likely to take place, only you have my free permission to act as you please, and to tell Charlotte that I wish her every comfort, and only regret my cursed folly in ever mentioning a subject likely to disturb the harmony of her house. * * * *
* * * * * * *
I am so much hurried by the General, who is waiting for me, that I have only time to say I ever am, dearest love, most affect. your's.

J. D.

Many thanks for the picture, which arrived safe.

No. 14.

(Addressed) "Miss Gordon, 4, St. Andrew's Square, Edinburgh."

MY DEAREST WIFE, Chelsea College, June 10, 1805.

I AM greatly surprised at your having so long declined writing; and not knowing to what cause it is owing, am inclined to attribute it to nothing very favourable to myself. If you have cause of complaint against me, why not at once, my love, tell me so, and not drive me to distraction by abstaining a fortnight without ever writing one line. I am unwilling to attribute it to a change in your affection, well knowing how much you may be trusted; but if I do not very soon hear from you, I shall not be perfectly easy on that head. If you are angry with me for going abroad I will allow you to have just cause; but when you consider the utter impossibility of my existing in this country as a gentleman, on account of the mean conduct of those who ought to be the first to support me; you will I hope allow there is more ground than caprice for this sudden movement. In the next place I solemnly assure you that *I will not be absent from you very long*, and that as soon as my affairs are put into any order and arrangement, my return will be certain. Situated as I am, is to me misery to exist; tired out of my life at home, and eternally quarrelling with those I am living with, renders it to my mind nothing less than a very accurate specimen of what may be expected hereafter; but having these things constantly tormenting me, *will you allow me to endeavour, by a short absence, to rectify them?* You know how little in point of use my stay would signify for these next four months, and with my turn for expence how very liable I am to involve myself ten times deeper than ever. *If in thus asking your consent* to what, although you may allow, you do not approve, I most humbly, dearest love, most solemnly conjure you to pardon me, and to repeat the assurance how deeply those attractions which were the first cause of our acquaintance remain fixed in my breast; and in whatever part of the world chance may throw me, they will afford me the consolation and hope of in a little time of proving my regard to the whole world; an event, evidently I think at no great distance, will at once render *me independent and you equally so ;* for while the obstacles and plagues which now torment me exist,

5 neither

neither you or myself can ever know either ease or happiness. You will, I hope, grant me your pardon for thus tormenting you with what I fear must evidently appear to you as a dull repetition of the same sentiments constantly made use of, but I solemnly assure you that they are the natural feelings of one who, though in every action of his life has hitherto been most unfortunate, yet has no wish to conceal them from you. To return to a more gay and proper subject for a letter. I am most happy that Charlotte has now arrived at the zenith of power, and is surrounded by every wish she can form; most sincerely do I congratulate her — and although an idle moment put a slight check to our former acquaintance, yet I hope that on my return to this town next year, it may appear to her as the failing of human nature, and in a general confession to atone for the crime, may be productive of a renewal of our former friendship, as nothing could give me greater satisfaction than once more to be considered, as I believe I may be allowed, her *brother*. The people here say that old Pulteney never made a will. If she is the gainer by it, I hope so most sincerely. I supped the other night with a M. ****, who was a good deal in Edinburgh last winter. He said he knew you perfectly, and told me a great many anecdotes about you, which could not but be gratifying to me, as I find that the idle *bundle* is not so much forgotten as some people would have me believe.

When I leave this capital is I believe most uncertain. The ship I am going in is nearly ready; but no person can possibly say when she will be; and as to her sailing, I think it will not be for some time yet. Situated therefore as I am, pray my only love do write to me by return of post, and if you have any regard, or the least remains of the attachment you once had and professed, do write constantly to me, and at the same time forward *the paper I requested of you in my last letter, and acknowledge yourself my wife, that as we are not immortal, I may leave you, in trust of a friend of the greatest honour, the small remains of what once was a tolerable fortune.* Did I not consider this as most essentially necessary for both our interests, on my honour I would not request it; but as *you cannot refuse on any legal grounds, do my dearest wife forward it directly,* and let your pardon for all the uneasiness I have given you accompany it, or otherwise I shall be perfectly miserable; and I most solemnly promise that there is nothing on earth that you may request that I will not do, except remaining here, which situated as I am would render it perfectly unsafe

unsafe in me to comply with, as nothing but my departure can restore my fortune to what it once was, or cause the liquidation of those debts which have hitherto so long plagued and perplexed me. Having thus explained to you the whole cause of my departure, I am inclined from your goodness of heart, setting aside all other considerations or claims, to hope that the return of the post will bring back a perfect, free, and uncontracted pardon for past, for all sins committed, but particularly as they were not caused by myself, but the villainy and malice of others. I shall now conclude with every wish this world can bestow, may be your's, and that I ever am,

Dear Jacky,
most devotedly,
your *husband*,
D.

No. 15.

(Addressed) "Miss Gordon, Braid, near Edinburgh."

MY DEAREST LOVE, Chelsea, June 28th, 1805.

I RETURN you a thousand thanks for your kind remembrance of so idle a being as myself. I allow it is more than I merit, but I have endeavoured to do something in return for it. I have called on Lotta and Johnstone this day; they were out of town, but as soon as they return I will certainly call again and write her a letter expressing my sorrow for the disagreement, and hoping to be again considered as her *brother*, a title I would not give up for any consideration, and when I return, *our families* I trust will be on the footing they ought to be. But you must allow that he ought to have first spoke to me, as I could not consistently with etiquette make the first advances: although stifling all other feelings to the desire of reconciliation, I have in this instance been the first. I with this send you the hair so long wanted, and which you ought ere this to have received. It was by mistake sent to Colonel Dalrymple, where it was likely to remain, had I not luckily arrived in town. If it does not please you, write to Wirgman, St. James Street, he will alter it, and has my directions to forward to you any thing you may write to him for, so do not out of false notions of economy deny yourself what you require, as I should not wish *my wife* on any account

count to appear in any thing not perfectly consistent with her rank. The Duchess is still in London, If I remain here till Sunday Sir Willoughby Aston has promised to introduce me to her notice. * * * * *
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I am going this evening to a masquerade, and afterwards to Mrs. Hamilton's, our relation: Lady H. Dalrymple is to be there, and I expect of course a great deal of railery, not having seen her since the confession she made me make at Dunbar relative to certain affairs in which *you* were greatly concerned, but by which I fear her Ladyship did not greatly improve her stock of knowledge on the subject. * * * *
* * * * * * *

I arrived here very late on Tuesday from Suffolk, and now find I might as well have remained where I was,* but I confess the country is to me so horribly dull, that I find time too heavy on my hands to admit of a long stay there. I want to go north, but in the state of uncertainty relative to my going abroad, I do not think it adviseable to leave this place. To say the truth, I begin to wish I had not [torn] to the proposal, but as my relinquishing it now would only gratify certain people whom I equally detest and depise, I am rather inclined to proceed. But of my departure you shall have ample notice. Will you send me a lock of your beautiful hair, as I intend having it set in a new form, particularly as the only lock I have at present is too small to convey to me the remembrance I wish. There is one thing, my love, which annoys me, I mean the reflection of not having behaved *to you so liberally* as I ought to have done; but I hope you will pardon me, and in return *you have my free permission from the 16th of November to make whatsoever expence you please, as I will before my departure arrange all money matters in such a manner as to give you every opportunity of gratifying your taste or any other fancy you may take into your head.* I hope that virgin sister of mine is likely to change that odious appellation. You should introduce some captain to her that she might at least be on equal footing with yourselves. * * * * *
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God bless you, my dearest Love,
ever affectionate *Husband,*

A.

SIR, Ballencrief House by Had.
19th Nov. 1807.

AS I find by means of the correspondence I have had the honor of having with you, that the footing on which I stand with Mr. Dalrymple has transpired, and through the Duchess of Gordon, it has come to both my brother's ears. In this case I shall have no hesitation in putting my papers into the hands of a man of business, and establishing my rights, as it is a very unpleasant thing to hear different reports every day. The last one is, that Mr. Dalrymple had ordered a new carriage on his marriage with a nobleman's daughter, and that his and her arms were actually quartered on the carriage. All these various reports came from the Duchess of Gordon, and she says, from what she learnt through you, from a friend of your's, that I have Mr. D. completely in my power; that I can either make him acknowledge me publicly as his wife, or make him pay a very large sum of money. The latter of which I shall certainly not do. I do not want money, I want justice; and as I am used extremely ill by him, I shall shew the world who has been to blame. If you, Sir, with your usual goodness of heart, did let him know my determination in this business, and that I am to have the support of my brothers in the case, and unless he comes forward and says he means to behave like a gentleman, and as he ought to do, I will make him. A maintenance he is obliged to allow me, whether he lives with me or not; few would have borne this treatment so long, and if the secret had not been divulged through you, I do not believe I would have divulged it, for fear of involving others; but, on the whole, I believe I am obliged to you. I have the houour to remain,

Your very obedient humble servant,

J. GORDON.

(Addressed) " Samuel Hawkins, Esq."

B.

(Private.)

SIR, Edinburgh, May 9th, 1808.

YOUR former goodness to me induces me to again trouble you with a few lines, to see if you would have the goodness to let me know if there has been any accounts lately from Mr. Dal-

Mr. Dalrymple. My unhappy situation is the only apology I can offer for the uncommon trouble I have offered you, and which your humanity has paid attention to; any real friend of Mr. Dalrymple's ought to caution him against forming any new engagement, as though I have not brought forward my claims at this time for particular reasons, that is not to say I have relinquished them. That I am determined I never will do, and were he to think of forming any of the connexions that have been talked of, or any connexion whatever, I will inmediately come forward with my claims, which must put himself and the unfortunate woman in a most disagreeable situation. My idea is, that he is not aware how binding his engagements are with me, and though this says little for his honor, some friend ought to warn him of his situation. ( ) I am convinced he will force me to strong measures ere long. Pray excuse my troubling you, but my sufferings must plead my apology. I know not what comfort is since this cruel business.

I have the honour to remain, &c. &c.

Samuel Hawkins, Esq.

No. 16.

(Addressed) " *Miss Gordon, Braid, near Edinburgh.*"

MY DEAREST LOVE, Portsmouth, July 19, 1805

I HAVE been so hurried on my departure for this place that I have been literally travelling for this fortnight, but at last am stationary at this most *delectable* place. As yet no convoy is or for some days likely to be appointed; and as I dread the thoughts of remaining at so horrible and dirty a place, I think it very likely that I shall return to the centre of all gaiety, London, till necessity obliges my departure. I at present feel by no means inclined for a Mediterranean trip, and could I by any means in the world contrive to be off, I should certainly make use of them. As things are at present, I purpose returning here in January or sooner if possible; but as all arrangements of this nature must be liable to so many changes, I do not fix any precise time for my return, as you may depend on my taking the very first opportunity of leaving a country which I by no means approve of, and which nothing but a foolish pique induced me to volunteer for; to add to all my misfortunes, just three days before I left London, I was introduced to the Duchess of St.

 Alban's.

Alban's. * * * * *

My father was suddenly taken ill after dinner on Monday, and they were at first very apprehensive something serious might have happened; but however he has rallied again, and they say better than before. He left this place the next morning for Chelsea. I would recommend you to enclose all my letters in a packet, to be forwarded to me through the care of Sir Rupert George, the Transport Office, London, who has more frequent opportunities of forwarding them than any other person. By the bye, it is very extraordinary that I have not received one line from you for this fortnight past, which I attribute to the letters being missent, as there have been several letters written from London to me which I have never received. I wish you would before I go acquaint me where your brother is likely to be found, as I particularly wish to meet him. What sort of a disposition is he of, that I may be able to understand how to manage him in regard to yourself? * * * *

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London is now nearly over, the place is becoming quite deserted: indeed I am not sorry for it, as no one ever left a place with more reluctance than I did town; and in exchange have got into a vile beastly place, and on the high road to a worse. I fear long enough before this reaches you I shall have taken my departure; but before that event takes place I must assure you that it is my fixed determination that nothing in the common course of things shall detain me there beyond the time first specified; and as that is so short, I think we can only look forward to it; *there is one thing which I particularly wish to caution you about, which is never to give any belief to a variety of reports which may be circulated relative to me during my absence. If you do you will render yourself eternally miserable, and produce a breach between us which nothing in this world ever can rectify. I shall not explain to what I am alluding, but I know things have been said, and the moment I am gone will be repeated, which have no foundation whatever, and are meant only for the ruin of both. Once more therefore I entreat you, if you value your peace or happiness, believe no report about me whatever, unless you know it to be true.* This advice you will thank me one day or other for—at present it may appear harsh and ill-judged, but time will prove to you how justly I have foretold what will happen. I am sorry I did not see Charlotte before I left London, but in fact I was so very much hurried with the preparations and other troubles, that when they returned I had no time to see them. A thousand thanks for the hair.

hair. I have it most beautifully set, and shall keep it as a memorial of pleasures past, but which will I hope soon return. *Why do you not write to Allen and order another riding habit? He has my directions to make whatever you think proper to order; so it is your own fault if you ever want any thing*—and when I am in Italy, if there is any thing you may particularly fancy, it shall be sent you. How is your father in health? in temper I should think nothing extraordinary.

God bless you, ever dearest Love,

Your's, J. D.

No. 18.

(Addressed) "Miss J. Gordon, Sir J. Johnstone's, Bart. Ballencrief, Hadding."

Grand Parade, Brighthelmstone,
26th Oct. 1807.

MADAM,

VERY unexpectedly until within these few days only, since I did myself the honour of addressing you from Mr. Coutts's Banking House, have I continued away from this place, so that the contents of your several letters were entirely unknown to me until my return, and under circumstances apparently so disadvantageous as I appear to have been placed in one of them, as also indeed to have relieved you from a considerable degree of anxiety on your own account, I should not have deferred so long satisfying you in your different enquiries; and reserving all explanations as to myself, I shall begin first with assurances to you that nothing really can have been more groundless than the extraordinary report circulated in your part of Mr. Dalrymple being either previously to or since the time of your enquiring of me, being in London, or even one thousand miles of it, having continued at Vienna, from which place I have received frequent accounts from him, and the last (making allowances for the great difficulty of communication) of recent date: so far too from its being at all in his contemplation even to return to this country, that he speaks decidedly of its being his intention to remain abroad for two years, and appears to have a strong inclination to extend his present quarters to a very considerable distance; having disposed, I should hope entirely to your satisfaction, of the groundlessness of that part of the report, it must be wholly needless to enter at all into the remainder of it, unless it may be to observe, that from the same quarter, in which a freedom of speech appears to have

have been made use of to my own prejudice, may have originated that, which certainly with no foundation at all, in the instance you allude to at least, can be ascribed to Mr. Dalrymple. Now with regard to any disclosure on my part of the correspondence which I have had the honour of holding with yourself, I beg you to rest assured that I have been particularly guarded; but when a young and impetuously minded character should on the first and only interview I ever had with him, have declared it to be his fixed determination hand over head, and with the utmost violence, to proceed against one for whom you had expressed that affection so natural in a near connection, it was at least I thought necessary to let him be informed that I have been in correspondence with yourself on the subject, and that such circumstances had come to my knowledge as would, I was sure, preclude him from taking any such course as he proposed. I however never produced one single letter of your's.

I have the honour to remain, &c.
SAMUEL HAWKINS.

No. 19.

(Addressed) "Miss J. Gordon, Ballencrief House, Haddington. N B."

Grand Parade, Brighthelmstone,
11th Dec. 1807.

MADAM,

WHEN I did myself the honour of last addressing you, although dated I believe as above, it was in a great hurry at an inn on the road just as I was changing horses, and in my way on a very long journey into Wales, from which part I only returned this day, or I should certainly sooner have acknowledged your letters from Ballencrief House, and which I very much wish I was able to do more to your satisfaction; but the present most extraordinary situation of this country, with all parts of the Continent, has effectually indeed cut off every sort of intercourse. I am wholly at a loss in what way to forward a letter to Mr. Dalrymple, and he must be so much so himself, I apprehend, that I have no expectation now of hearing until matters take a more favourable turn. The last letter I received from him was dated from Vienna, and it is now upwards of three months since; at that time any breach between the Austrians and this country was not in the least foreseen by any of the English residing at Vienna: but the Austrian Minister having yesterday, I was informed, required his passports, the English will be without any place of

 refuge

refuge whatever, unless they should be able by any means to get into Switzerland. There is too much reason, therefore, to conclude that even those English at Vienna will share the same fate with their other countrymen on the Continent.

In Mr. Dalrymple's different letters, and particularly the last of them, I am given to understand by him, that in place of two years, the first time limited for his stay, he should not think of quitting the continent at all, being heartily disgusted, as he observed to me, with England and its society. If any thing should by chance take me into the north, I should in that event do myself the honour of seeing you, when I might probably be more unreserved than I am in writing. At any rate I feel that I should have very little difficulty in satisfying you of my having acted throughout in such a manner as could not fail meeting as much with your own approbation as it would, I am convinced, that of Mr. Dalrymple. It is best for me not to mention the name of the person I alluded to in my last, but I have the satisfaction to think that by my timely explanation, and that only too in a general manner, much mischief was in all probability prevented; I could most easily defend the part I took to the Duchess of Gordon, or to any of your own family, and most seriously wishing that I could prove much more useful to yourself or Mr. Dalrymple,

Have the honour to be, &c.

SAMUEL HAWKINS.

No. 20.

(Addressed) "Miss Gordon, Braid House, near Edinburgh."

MADAM, Findon, near Shoreham, 7th June 1808.

JUST at the moment that I ascertained, as I thought, Mr. Dalrymple's being at Palermo, and was actually writing to him at that place, having had a promise of my letters being forwarded from the Commander in Chief's Office, who, to my no small surprize, should make his appearance here but Mr. D. himself? He left Palermo, he informed me, only six and twenty days previously to his going down to me at Brighthelmstone, and finding that I had left that place, came over immediately to me at my new residence at Findon. Great, however, as my surprize was at seeing him, it hath been very much exceeded indeed by my having received letters from two very particular friends of his late father, informing me that on the very day after his return from hence to town he was married to Miss Manners. It being, as I have already intimated to you, known to, some of

his friends, that Mr. Dalrymple had so recently to his marriage with Miss Manners, been with myself, it was not altogether unnatural I felt (ill-founded as such a conjecture certainly was) that it should strike them I might not only be privy to, but even the adviser of such a measure as was immediately afterwards taken ; and therefore to do away the slightest surmise of the kind, I felt it incumbent on me to make assurances to them, as I also do to yourself, that neither in thought, word, or deed, have I at all participated in it, but on the contrary I believe my advice and opinion were considered (to use his own term) much too gloomy, and were the means, I dare say, of completely deterring him from confiding one syllable of his intentions in my breast.

I have the honour to be, &c.

SAMUEL HAWKINS.

Extract from the personal Answers on oath of JOHN WILLIAM HENRY DALRYMPLE, Esq.

THE Respondent positively saith, that the only time when any connection by carnal copulation took place between them was on a night in the aforesaid month of May, at the house of the said Charles Gordon, Esq. at Edinburgh, prior to the signature by the Respondent of the Paper, marked No. 1.

Extract from the personal Answers on oath of Miss JOHANNA GORDON.

THE Respondent further answering, says, that she denies that no carnal copulation did ever take place between the said John William Henry Dalrymple and the Respondent at any time subsequent to the signing of the said marriage contracts articulate, or either of them, or that the said John William Henry Dalrymple and the Respondent did not in pursuance and upon the faith of the said marriage contracts articulate, or either of them, cohabit together as lawful husband and wife, or ever own or acknowledge each other as and for lawful husband and wife; for the Respondent saith, that subsequently to the written acknowledgement of marriage bearing date the 28th of May 1804, they, the said John William Henry Dalrymple and the Respondent, upon the faith of their said marriage, consummated the same, and several times afterwards had the carnal use and knowledge of each other's bodies, as well at the house of the Respondent's father in Edinburgh, as at his country-seat at Braid.

Appendix, No. II.

PAPERS in the Case of Gilbert v. Buzzard and Boyer.

No. 1.

A Letter addressed to the Rt. Hon: Sir W. Scott, on the subject of the Durability of Wood and Iron.

Belle Vue House, Chelsea,
February 10, 1821.

MY DEAR SIR,

SINCE I have read the Papers which I lately returned to you, I am more convinced than ever that the question as to the comparative duration of wood and iron cannot be satisfactorily decided by arguments founded upon Chemical Theory, for the diversity in the opinions of men undoubtedly well versed in the Science of Chemistry (as exhibited in the above mentioned Papers) evidently proves that these opinions have been rather formed upon conjectures than upon facts. Notwithstanding therefore all the love and respect with which I regard my favourite Science, I am induced to make it give place to another mode of investigation which to me appears preferable, because it seems to be more certain. I shall now therefore beg leave to submit to you such facts as I have been able to collect, tending to show the comparative duration of wood and iron when placed under equal circumstances; and for this purpose I will endeavour to state the effects which take place on wood and iron,

1st, In very dry situations;

2dly, In the opposite extreme, or that of permanent submersion in water;

And 3dly, In situations which are damp, or where there may be alternations of dryness and moisture.

Wood, when well seasoned as it is called, and placed in a dry situation, will frequently remain unimpaired for many centuries. We have instances proving this, in the timber of ancient buildings, and articles of furniture; but amongst the most remarkable are the cases made of Egyptian sycamore, containing certain mummies.

These are very perfect, and have unquestionably lasted more than two thousand years.

It must however be recollected, that these have not only been placed in dry situations, but have been also protected by a coat-

ing of Plaster, which has contributed to their preservation, like the calcareous Incrustations on vegetable substances found at Carlsbad and other places, or the siliceous depositions upon similar substances produced by the waters of the Geyzer Fountain in Iceland.

Dryness is essentially requisite for the preservation of these, but the Plaster of the Mummy Cases, and the Incrustations which I have mentioned, also protect the Wood from the attacks of Insects, which so frequently in Europe cause its destruction; whilst the same species of destruction takes place in India, to an almost inconceivable extent, by the ravages of the Termites or White Ants, whose attacks can only be resisted by Glass, Stone, or Metal.

Now supposing Iron to be placed under circumstances similar to those which have been mentioned, we have every reason to believe, that it would last *ad infinitum*; for in a dry situation we do not know of any Agent by which it can be corroded, and we are perfectly certain that Insects cannot make any impression upon it.—It therefore appears, that even under circumstances most favourable to Wood, this will be much surpassed in point of duration by Iron.

I shall now proceed to consider the effects produced upon Wood and Iron when permanently submerged in Water, and first as to Wood; we have many examples of Trunks of Trees which have been long preserved in the state of submersion, and we may take as an instance the Submarine Forest at Sutton, on the coast of Lincolnshire, described in the Philosophical Transactions for 1799, p. 145.

In this and other similar instances the Wood is solid and well preserved, but is more or less of a black hue, which I am inclined to attribute to incipient carbonisation produced by the action of water, and which carbonisation I believe has contributed very much to the preservation of the Wood.

It is however remarkable that (excepting the Piles of some ancient Bridges *) not any example occurs of Wood in a Manufactured State having been so preserved, at least I do not recollect to have seen, read, or heard of any such case; whilst as to Iron, innumerable facts can be cited to prove how very little this Metal becomes corroded in similar circumstances.

Even from depths of the Sea, Anchors, Chains, Bolts, Rings, and Cannon have been raised after the lapse of many Years, and

* Also the Conway Stakes.

have

have been found in a more or less perfect state; but as these are not so immediately applicable to the present question I shall pass them over, and more particularly notice the effects produced upon Iron by long submersion in the Water of Lakes and Rivers.

It is well known that in the year 1568, when the young George Douglas escaped with Mary Queen of Scots from the Castle of Lochleven, he threw the Keys of the Castle into the Lake. These Keys were accidentally fished up from the bottom of the lake about five years ago, and I have been informed were found nearly or quite in as perfect a state as they probably had been when cast into the Water.

I remember to have seen at Sir Joseph Banks's, about three years ago, several Swords and Daggers which had been brought up from the bottom of the Thames, and which from their make were at least of the 15th century.

These were in good preservation, very little corroded, and only covered with a thin coat of blackish brown rust, which could easily have been removed by a Cutler, and then the Weapons would have been as fit for service as ever.

Even the slender Spindles or Spikes by which the hilts were connected with the Pommels remained perfect; but not the smallest trace of the Wood which probably had formed the handles could be perceived.

Sir Joseph Banks also possessed various Swords, Daggers, and an Axe of Steel, which were found with weapons and utensils of Bronze in the bed of the river Witham in Lincolnshire, when that river was cleaned out in 1787 and 1788. Some of the steel weapons were deemed to be Saxon or Norman, but others as well as the Axe appeared to be decidedly Roman. Dr. Pearson has given an account of them in the Phil. Trans. for 1796 pp. 395—450.

Here again, although we find that several of them, such as the Sword Fig. 1, the Axe Fig. 2, and the Dagger Fig. 4, Tab. XV, were in good preservation, yet not the smallest particle of Wood which had formed the handles could be found, and we may therefore conclude, from these and the other examples which have been mentioned, that Iron does not suffer by permanent Submersion in Water any thing like what might be expected, but that the case is very different as to Wood.

When however Wood and Iron are exposed to the effects of damp, or to the alternations of damp and occasional comparative dryness, then it is that both most speedily experience decay. This peculiarly merits to be considered as being more immedi-

ately

ately applicable to the present question, namely, the comparative durability of Wooden and Iron Coffins; and although we have not the means of making a direct comparison, Iron never having been employed until this time for such a purpose, yet I think we may form a tolerably correct estimate from the ancient implements and weapons so frequently found buried in the earth and in the tumuli called Barrows. Of course I only intend to notice those which are of Iron or Steel, but I may observe, en passant, that those made of Bronze, such as heads of Spears and the Implements called Celts, have never been found with any remaining portion of the Wood with which they had been originally connected.

The Iron or Steel Weapons, many of which are undoubtedly British and Roman, have been found under a great variety of circumstances, and often in good preservation.

A few examples selected from the Archæologia will be sufficient for my purpose.

Some short Roman Swords made of Steel were dug up between Spalding and Stamford in Lincolnshire. Archæol. vol. 5. p. 115.

Account of Antiquities found in a Barrow at Aspatria in Cumberland by Mr. Rooke. Archæol. vol. 10. p. 112. Amongst these are described an Iron broad Sword, a Dagger, a Bit, and a Spur.

A Hatchet of Iron found at Kingsholm by Mr. S. Lysons. Antiquities in Gloucestershire. Archæol. vol. 10. p. 133.

An Iron Dagger, with heads of Spears, &c. apparently Roman, and found by Mr. Gell, near Hopton in Derbyshire, covered with Stones, in a situation where it is supposed a battle had taken place. Archæol. vol. 12. p. 2.

Various pieces of Iron, and a small Iron Chain, found in the remains of a Roman building at Caer Irun in Caernarvonshire by Mr. S. Lysons. Archæol. vol. 16. pp. 130. 132.

These examples are sufficient to show that Iron will last a very considerable time, although exposed in different situations to the alternations of moisture and dryness; but this is not so in respect to Wood: for in the innumerable instances which might be brought forward in addition to the few which I have selected, not any example occurs of the handles of the Axes and Celts, of the Shafts of the Spears, or of those parts made of Wood which had been connected with the Blades of the Swords and Daggers, having ever been found; and it is therefore evident that the Wood in all these cases has long ago perished, whilst malleable Iron, even in the disadvantageous form of laminæ, has outlasted the former for ages, although exposed under similar circumstances.

One

One solitary instance, and but one, presents itself to me, in which even the vestige of Wood has been observed, and as it seems not only to be curious, but also very applicable, I shall here particularly take notice of it

Mr. Hayman Rooke, in a letter to Sir George Yonge, dated December 5, 1790, and printed in the 10th volume of the Archæologia, p. 378, has given an account of some Roman remains in Sherwood Forest, and afterwards mentions three large Tumuli or Barrows situate in the Forest about a mile from Oxton, one of which he opened, and states, that it was formed of fine mould to the depth of seven feet and a half from the top to a little below the natural soil; after which he says, " We came to a kind " of gray sand mixed with clay about five inches thick, some " parts of which were *moist;* on this lay an Urn half full of " ashes, and covered with a piece of coarse baked earth, which " (the piece of baked earth) broke when taken up. On examin- " ing this Urn, to my great surprise it appeared to be Iron cor- " roded with Rust. On one side and at the bottom is a piece " of Wood which sticks to the Urn, and several small pieces " were found near it, which, from their shape, being hollowed " out, evidently appeared to have stuck to the Urn. I think " there is great reason to suppose that this Urn was deposited " in the Barrow in a Wooden Case, which when it began to " decay and get moist would naturally adhere to the Iron."

With this Urn Mr. Rooke found a Sword in a wooden Scabbard, and also a Dagger, which likewise had been in a Scabbard of Wood, but this was so much decayed that only some portions which stuck to the blade could be distinguished. The Scabbard of the Sword was the least decayed, but when the Wood was pressed, *it mouldered into dust*. Mr. Rooke afterwards states, that with this Urn and the Weapons some Glass Beads were found, and then says, " I think there is no doubt of these Barrows hav- " ing been Sepulchres of the antient Britons; and I should " suppose, from its vicinity to this Barrow, the little inclosure " above mentioned was a work of the same people."

" The Iron Urn is certainly a very singular and curious disco- " very, and I should think not manufactured in this Island."

The Reverend Mr. Whitaker tells us, (Hist. of Manchester vol. 2. p. 28.) " that it was late before any Mines of Iron were " opened in this Island. They appear to have been begun only " a few years before the descent of Cæsar, and even then were " carried on not by the Britons, but the Belgæ. To that period " both of them received from the Continent all the Iron they " had among them."

" In

"In this Traffic (says Mr. Rooke) Arms and Domestic Utensils "were most probably imported, and as the Gauls are supposed "to have used Urn Burial, it is not unlikely that they should "export a few Sepulchral Urns of that durable Metal to Bri- "tain; by which it will appear that the Britons used that mode "of interment before the time of the Romans in this Island."

Here we have the positive fact of Wood and Iron having been buried together in a situation not favourable to the duration of either; and when speaking of the Wood, it is quite manifest that Mr. Rooke only means to say that it could be distinguished as having been Wood, and not that it was Wood in its perfect state; for from his expressions it clearly appears to have been in that state of decay commonly called Touch Wood, so far decayed indeed, that when it was pressed it mouldered into dust.

The Iron also was much corroded, for the Sword, which was two feet six inches in length and four inches broad, when taken up, broke into seven pieces; this likewise happened to the Dagger; but the Urn remained entire, and was proved by the magnet to have retained its metallic properties, notwithstanding the probability that more than eighteen centuries had elapsed since it had been buried in the earth.

From the various facts therefore which I have thus, my dear sir, submitted to you, I feel convinced that Iron, when buried in the earth, is much more durable than Wood; and in saying this, I speak of wrought iron, but should cast iron ever be employed in the manufacture of coffins, it cannot be doubted that these (brittleness excepted) will in duration much exceed those which are now made of that metal in its malleable state.

With great regard, believe me,
Dear Sir William,
Your most faithful and obedient servant,
CHARLES HATCHETT.

The Right Honourable
Sir William Scott,
&c. &c. &c.

No. 2.

Belle Vue House, Chelsea,
April 23, 1821.

My Dear Sir,

THE timbers of our men of war, which are of ancient date, I have no doubt are those which, from their situation in the ships, have in a great measure been kept dry, and they may, therefore, be regarded as placed under circumstances very similar to the timbers of antient buildings.

The

The long duration of the Conway stakes, and of the piles of some antient bridges (such as those of Trajan's Bridge on the Danube) I am inclined to attribute partly to the quality of the wood, and partly to the nature of the soil into which they have been driven.

The comparative duration of wood (I mean oak compared with oak) is very different, not merely as to the well known inferiority of the Sap wood to that which is called the Heart; but between the Heart wood of the same species of oak trees planted in different soils; and there is great reason to believe, that the quality of the soil is commonly the cause of the difference in the quality of the wood.

In some places (and I have understood that Richmond Park is one of these) the oak trees, although of fine growth and healthy, are found to be red-hearted, which, by professional men, is considered as an indication of very inferior durability; and on the other hand, the oak of the New Forest, and other places, is not so, and is, therefore, of greater value.

I need not remind you of the numerous instances which prove the effects of soils on the vegetable kingdom.—The wine called Sercial, is very unlike the other wines of Madeira, and not at all resembling Hock wine; yet the vines which produce it were carried from the Hock countries, and planted in the island of Madeira.—Coté Roti would have been a very different wine had it been made from the same species of grapes growing on the other bank of the Rhone.—We must, however, admit, in addition to the difference of soil, the conjoined influence of aspect and of climate.

A great difference in duration, I conceive, may also arise from the nature of the soil in which piles have been fixed; for, when implanted in a very firm and binding soil, the duration of the wood is likely to be great, whilst the contrary may be expected in a porous or bibulous soil. I have seen some instances of this.

In addition to these remarks, I may add the well known fact, that timbers which have been superficially charred, last much longer in the ground than timbers which have not been charred.

I believe, therefore, that the quality of the wood, and the nature of the soil, have been the causes of the long duration of those pieces of timber or piles, which, *in a few instances*, have been found nearly or quite in a perfect state.—Believe me,

Dear Sir William,

Most truly and faithfully your's,

CHARLES HATCHETT.

The Rt. Hon. Sir Wm. Scott,

&c. &c. &c.

No. 3.

SIR,

DO forgive me; nothing but the most urgent necessity should have induced me to approach you.

The public entertain an idea that 10*l. may be demanded,*—I have three establishments to sustain, and since March 2nd, I have sent out but one iron coffin; I have two corpses in one parish, which have been refused admission to the family's own grave; the family have been induced to wait, hoping for your decision daily; as you, Sir, stated, that you would appoint a day, we thought it would be early.—Humbly asking your forgiveness,

I am, Sir,
Your very humble Servant,
EDWARD LILLIE BRIDGMAN.

Goswell Street Road,
March 28, 1821.
To the Rt. Hon. Sir Wm. Scott.

No. 4.

SIR,

FEARING that the table of fees exhibited by St. Andrew's parish might be decided on before the enclosed proposal could reach you, through the Register's Office (to which I shall immediately forward it) I have presumed to transmit it for your consideration.

Earnestly hoping, that it may lead to a termination of the disputes and litigations in which I have been unfortunately involved with the parish of St. Andrew,

I remain,
With admiration and respect,
Your obedient Servant,
EDWARD LILLIE BRIDGMAN.

Goswell Street Road,
May 9, 1821.
To the Rt. Hon. Sir Wm. Scott.

No. 5.

The following Document accompanied the preceding Letter.

TO exonerate the parishes within the bills of mortality from inconvenience, and furnish means of judging of the comparative

tive durability of wooden and iron coffins, I, Edward Lillie Bridgman, the patentee of the iron coffins, will engage to purchase a grave in any parish in which I may wish to inter a corpse, paying the same price for it that the parishioners pay for family graves, and paying for each interment in it at the same rate which parishioners pay — and I will engage to inter none in it but parishioners.

It being acknowledged, that plate iron 1-12th of an inch thick, painted neither externally nor internally, will soon oxydate and fall in, unless supported by perpendicular bars. But as a fear exists, that the patentee will use more durable materials, he is ready to execute a bond to the company of Parish Clerks, or any person the court may appoint, engaging to forfeit one hundred pounds, if any other than unpainted and unvarnished plate iron coffins, not exceeding the 12th of an inch in thickness, and unsupported by perpendicular iron bars, are buried in the grave he may purchase in any parish. Should he wish to inter coffins made of a thicker or different metal, he will make a special contract for its interment, and the Searchers can report the material and thickness of the coffins.

As the inhabitants of a parish contribute to the purchase of burying grounds, and parishioners who have family graves acquire them by purchase, it is supposed that they would be exempted from the payment of any additional fee for interring in their family grave or vault, which already belongs to them by purchase, and is not available for burials to the parish.

EDWARD LILLIE BRIDGMAN.

Goswell Street Road,
May 9, 1821.

No. 6.

To the Honourable the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled,

The Humble Petition of EDWARD LILLIE BRIDGMAN, most respectfully sheweth,

THAT the idea of employing wrought iron in the construction of coffins, originated in the desire to secure the relatives of the dead from the shocking apprehension of their deceased friends being sacrilegiously torn from their graves or vaults, and exposed to the dissecter's knife, or to articulation; to exempt the public from the disgusting exhibition of the mangled remains of half decayed

decayed bodies; and preserve its health by preventing the noxious effluvia which arises from decomposing bodies polluting the atmosphere.

Your petitioner humbly represents to this Honourable House, that the parish of St. Andrew, Holborn, having refused to bury the corpse of Mrs. Gilbert in a wrought iron coffin, application was made to the Judge of the Consistory Court, who ordered its burial; but has subsequently appointed a fee of 10*l.* extra on the interment of each metal coffin in that parish.

Your petitioner humbly presumes to think, that this fee, which will operate so as nearly to destroy his invention, is not proved necessary by the evidence of the Chemists, on whose opinion it is professedly grounded — the only affidavit at all referring to the comparative duration of wood and iron when interred, mentions the probability of iron coffins lasting three times as long as wood. And, although this affidavit is expressed in doubtful language, and is in direct opposition to the opinions of eminent practical Chemists, yet the Judge has imposed an additional fee of more than eight times the amount of the common fee, or, as the supposed prolonged occupation of the ground, is the avowed object of its imposition (the minister's duties not being at all increased) the Judge has, in fact, estimated the duration of iron coffins as being thirty times greater than those made of wood.

Your petitioner is aware, that an idea exists of iron coffins soon filling all the church-yards in London: But he cannot help expressing surprise at such an erroneous opinion being ever entertained; as, in addition to the well known destructibility of thin plate iron when buried, should half the persons who die in London in thirty years, supposing its population a million, be buried in iron, which, attachment to old habits, and the limited means of the manufacturer must prevent, still the ground occupied with their coffins annually, would only amount to two square roods and six square poles, if the coffins are buried to the depth *of fourteen feet*; *as* 140 *six-feet coffins only occupy a cube* 14 *feet square. For, as one six-foot coffin occupies only a square yard,* 16,666 *coffins buried* 10 *deep will only occupy* 1,666 *square yards and* 3-5*ths, which is two square roods and* 5½ *square poles.*

Your petitioner presumes to think, that iron coffins are not only deserving of patronage, as offering security for the dead, but as furnishing employment for the living, and as preserving our timber for naval and domestic purposes. One hundred coffins weighing five tons, require 115 ton of ironstone, limestone, and coal, which cost only 6*l.* 10*s.* in the mine, but would cost the manufacturer

manufacturer about 200*l*., as they would furnish 1,290 days' labour at 3*s*. per day; while the manufacture of 100 wood coffins would not occupy 100 days.

Your petitioner having observed how greatly the public are inconvenienced by walking funerals, and how much the feelings of the mourners were wounded by their being made a public spectacle on so distressing an occasion, and their health injured by the unfavourableness of the weather, invented a joint-hearse and coach to convey the corpse and eight mourners to the place of interment, at such a moderate expense, as would enable the lower classes to use this conveyance, for which your petitioner obtained his Majesty's Royal Letters Patent, in April 1818. Having built this vehicle, your petitioner applied to the Commissioners of Hackney Coaches for a licence, which was refused, on the plea that they were diminishing the number of Hackney Coaches and Chariots. Hearing, some months after this application, that the number of hackney coaches and chariots was sufficiently reduced, and that new licences were granting, the application was renewed — but your petitioner was informed, that although the Commissioners had intended to have licenced him, yet, in consequence of the proprietors of mourning coaches petitioning against him, they should not grant a licence. The Lords Commissioners of the Treasury were appealed to; but they declined interfering. The proprietors of mourning coaches, finding that they had succeeded in preventing my obtaining a licence, entered into a combination not to let me hire any of the mourning coaches customarily used, nor could your petitioner hire any in his own name until he had indicted them for a conspiracy. Your petitioner humbly submits to this Honourable House, that this denial of a licence was a great personal injury, as he had incurred considerable expences in building the joint-hearse and coach, buying horses, taking out a post-horse licence, &c. &c., and by preventing his performing a contract made with the parish of St. Martin's in the Fields, to carry their dead for interment to Camden Town. That this suppression of his invention is an injury to the lower classes, who absolutely need an improved mode of conveying bodies for interment, especially where burial-places are distant from the habitations of the deceased, and in children's funerals; among all classes the danger of infection being so great as to occasion the prohibition of children's coffins being carried in hackney coaches. And that the revenue must be injured by preventing the adoption of these carriages, it being assumed, that their utility would bring them into general use with those.

those, whose limited means prevent the employment of hearse and mourning coaches.

Your petitioner humbly represents to this Honourable House, that at the time he built the joint-hearse and coach, the possibility of the Commissioners of Hackney Coaches refusing to licence a vehicle which they acknowledge is legal, was not anticipated. The impossibility of obtaining redress from the Commissioners of Hackney Coaches or the Lords of the Treasury, compels your petitioner to look to this Honourable House as the only court that can afford him relief.

Your petitioner extremely regrets being necessitated to trouble this Honourable House, but he finds that he cannot appeal to the Consistory Court against its decision, or bring his case in any other way before that court; and having embarked his property in his Invention, at the time when the choice of materials for making coffins rested with the purchaser, and the Judge of the Consistory Court having *confirmed* that right.

Your petitioner earnestly entreats this Honourable House to grant him such relief, as its wisdom may dictate, and, as in duty bound, he will ever pray.

EDWARD LILLIE BRIDGMAN,

Furnishing Undertaker, Goswell Street Road, London.

June 19th, 1821.

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